



Calhoun: The NPS Institutional Archive
DSpace Repository

Theses and Dissertations

1. Thesis and Dissertation Collection, all items

2013-03

**ESTABLISHING POST-CONFLICT JUSTICE
THROUGH U.S. OCCUPATION: MILITARY
TRIBUNALS AS A MEANS OF TRANSITIONAL JUSTICE**

Bock, Adam R.

Monterey, California. Naval Postgraduate School

<http://hdl.handle.net/10945/32795>

This publication is a work of the U.S. Government as defined in Title 17, United States Code, Section 101. As such, it is in the public domain, and under the provisions of Title 17, United States Code, Section 105, is not copyrighted in the U.S.

Downloaded from NPS Archive: Calhoun



Calhoun is the Naval Postgraduate School's public access digital repository for research materials and institutional publications created by the NPS community. Calhoun is named for Professor of Mathematics Guy K. Calhoun, NPS's first appointed -- and published -- scholarly author.

Dudley Knox Library / Naval Postgraduate School
411 Dyer Road / 1 University Circle
Monterey, California USA 93943

<http://www.nps.edu/library>



**NAVAL
POSTGRADUATE
SCHOOL**

MONTEREY, CALIFORNIA

THESIS

**ESTABLISHING POST-CONFLICT JUSTICE THROUGH
U.S. OCCUPATION: MILITARY TRIBUNALS AS A
MEANS OF TRANSITIONAL JUSTICE**

by

Adam R. Bock

March 2013

Thesis Advisor:
Second Reader:

Carolyn Halladay
Erik Dahl

Approved for public release; distribution is unlimited

THIS PAGE INTENTIONALLY LEFT BLANK

REPORT DOCUMENTATION PAGE			<i>Form Approved OMB No. 0704-0188</i>
Public reporting burden for this collection of information is estimated to average 1 hour per response, including the time for reviewing instruction, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302, and to the Office of Management and Budget, Paperwork Reduction Project (0704-0188) Washington DC 20503.			
1. AGENCY USE ONLY (Leave blank)	2. REPORT DATE March 2013	3. REPORT TYPE AND DATES COVERED Master's Thesis	
4. TITLE AND SUBTITLE ESTABLISHING POST-CONFLICT JUSTICE THROUGH U.S. OCCUPATION: MILITARY TRIBUNALS AS A MEANS OF TRANSITIONAL JUSTICE		5. FUNDING NUMBERS	
6. AUTHOR(S) Adam R. Bock			
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) Naval Postgraduate School Monterey, CA 93943-5000		8. PERFORMING ORGANIZATION REPORT NUMBER	
9. SPONSORING /MONITORING AGENCY NAME(S) AND ADDRESS(ES) N/A		10. SPONSORING/MONITORING AGENCY REPORT NUMBER	
11. SUPPLEMENTARY NOTES The views expressed in this thesis are those of the author and do not reflect the official policy or position of the Department of Defense or the U.S. Government. IRB Protocol number ___N/A___.			
12a. DISTRIBUTION / AVAILABILITY STATEMENT Approved for public release; distribution is unlimited		12b. DISTRIBUTION CODE A	
13. ABSTRACT (maximum 200 words) This thesis examines post-conflict justice in Iraq following the U.S. invasion, specifically, the legitimacy of the Iraq High Criminal Court and its first deliberation, the Al-Dujail trial of Saddam Hussein. It asks: How can the United States infuse transitional justice through Western forms of judicial procedures into the democratic transition of non-Western nations under U.S. military occupation? The analysis begins with International Military Tribunal at Nuremberg as a model of transformative post-conflict justice. Then it turns to the cloudier legacy of the Tokyo Trials, where the internal contradictions of this approach gathered force in the non-Western context and laid bare the shortcomings of the Nuremberg model. Finally, it examines the Iraqi tribunal, which demonstrated many of the shortcomings of earlier tribunals, to the detriment of the United States and the new Iraqi government. This thesis does not concern itself with the guilt or innocence of the former Iraqi dictator. The purpose is to better understand how the Coalition Provisional Authority established legal jurisdiction and to review the issues surrounding Saddam's trial. Finally, it suggests judicial processes that could be employed in non-Western cultures to support the transition from an insurgent post-conflict environment to peace.			
14. SUBJECT TERMS Transitional Justice, Justice, Tribunal, Saddam, Hussein, Al-Dujail, Nuremberg, IMT, Tokyo, Transformative Justice, Justice, Iraqi Special Tribunal, High Criminal Court, post-conflict, reconciliation, victors' justice, victor's justice, CPA, IST, IHCC, IMT, IMT-FE, Military Tribunal, Civil Military Relations, Civ-Mil Relations, Truth Commission, Trial, Iraq, Iraqi.			15. NUMBER OF PAGES 73
			16. PRICE CODE
17. SECURITY CLASSIFICATION OF REPORT Unclassified	18. SECURITY CLASSIFICATION OF THIS PAGE Unclassified	19. SECURITY CLASSIFICATION OF ABSTRACT Unclassified	20. LIMITATION OF ABSTRACT UU

THIS PAGE INTENTIONALLY LEFT BLANK

Approved for public release; distribution is unlimited

**ESTABLISHING POST-CONFLICT JUSTICE THROUGH U.S. OCCUPATION:
MILITARY TRIBUNALS AS A MEANS OF TRANSITIONAL JUSTICE**

Adam R. Bock
Major, United States Army
B.A., Colorado State University, 2001

Submitted in partial fulfillment of the
requirements for the degree of

**MASTER OF ARTS IN SECURITY STUDIES
(HOMELAND SECURITY AND DEFENSE)**

from the

**NAVAL POSTGRADUATE SCHOOL
March 2013**

Author: Adam R. Bock

Approved by: Carolyn Halladay
Thesis Advisor

Erik Dahl
Second Reader

Harold A. Trinkunas
Chair, Department of National Security Affairs

THIS PAGE INTENTIONALLY LEFT BLANK

ABSTRACT

This thesis examines post-conflict justice in Iraq following the U.S. invasion, specifically, the legitimacy of the Iraq High Criminal Court and its first deliberation, the Al-Dujail trial of Saddam Hussein. It asks: How can the United States infuse transitional justice through Western forms of judicial procedures into the democratic transition of non-Western nations under U.S. military occupation?

The analysis begins with International Military Tribunal at Nuremberg as a model of transformative post-conflict justice. Then it turns to the cloudier legacy of the Tokyo Trials, where the internal contradictions of this approach gathered force in the non-Western context and laid bare the shortcomings of the Nuremberg model. Finally, it examines the Iraqi tribunal, which demonstrated many of the shortcomings of earlier tribunals, to the detriment of the United States and the new Iraqi government.

This thesis does not concern itself with the guilt or innocence of the former Iraqi dictator. The purpose is to better understand how the Coalition Provisional Authority established legal jurisdiction and to review the issues surrounding Saddam's trial. Finally, it suggests judicial processes that could be employed in non-Western cultures to support the transition from an insurgent post-conflict environment to peace.

THIS PAGE INTENTIONALLY LEFT BLANK

TABLE OF CONTENTS

I.	POST-CONFLICT OCCUPATION AND TRANSITIONAL JUSTICE.....	1
A.	NUREMBERG TO IRAQ: HIGH ROAD OR DUSTY TRAIL?.....	1
B.	CULTURAL PERCEPTIONS OF JUSTICE	2
C.	TRANSITIONAL JUSTICE.....	3
D.	THESIS OVERVIEW	6
II.	THE NUREMBERG TRIALS.....	9
A.	ESTABLISHING THE LEGACY OF NUREMBERG.....	9
B.	VICTORS' JUSTICE: THE LEADING CRITIQUE OF NUREMBERG	15
C.	THE NEVER-ENDING TRANSITION?	18
III.	THE TOKYO TRIALS	21
A.	DEFEAT AND TRANSITION	21
B.	THE TOKYO JUDGMENT	24
C.	CONTEMPORARY PERCEPTIONS OF THE TOKYO TRIALS	27
D.	LEGACY, LEGALITY, AND THE FUTURE.....	31
IV.	IRAQ: AN EXAMINATION OF THE AL-DUJAIL TRIAL.....	33
A.	GENEVA, THE HAGUE, AND BAGHDAD	34
B.	ESTABLISHING THE IRAQI JUDICIAL SYSTEM	37
C.	THE AL-DUJAIL TRIAL: SADDAM'S DEFENSE.....	39
D.	THE LEGACY OF AL-DUJAIL?.....	42
V.	RECOMMENDATIONS FOR FUTURE TRANSITIONS	45
A.	THE LEGACY OF A LEGACY—AND ITS HISTORY	46
B.	TRUTH AND RECONCILIATION	47
C.	SHOW TRIAL VERSUS CRIMINAL COURT	48
D.	WHITHER TRANSITIONAL JUSTICE?.....	49
	LIST OF REFERENCES.....	53
	INITIAL DISTRIBUTION LIST	57

THIS PAGE INTENTIONALLY LEFT BLANK

LIST OF TABLES

Table 1.	Nuremberg Defendants (After Marrus, 1997)	13
Table 2.	Tokyo Trial Defendants (After Futamura, 2008).....	26
Table 3.	Al-Dujail Defendants	42

THIS PAGE INTENTIONALLY LEFT BLANK

LIST OF ACRONYMS AND ABBREVIATIONS

CPA	Coalition Provisional Authority
DOS	Department of State
IHCC	Iraqi High Criminal Court
ICC	International Criminal Court
ICTJ	International Center for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IMT	International Military Tribunal at Nuremberg
IMT-FE	International Military Tribunal of the Far East
IST	Iraqi Special Tribunal
SCAP	Supreme Commander for the Allied Powers
UN	United Nations

THIS PAGE INTENTIONALLY LEFT BLANK

ACKNOWLEDGMENTS

I would like to express sincere gratitude to the United States Army, which provided this educational opportunity to expand my professional and personal growth. In particular, I would like to thank BG Kelly Thomas and LTC Joseph Matthew, for their endorsement for my selection to attend the Naval Postgraduate School. I would also like to thank the many professors at the Naval Postgraduate School whose insight, knowledge, and enthusiasm prompted me to follow my “academic curiosity.” Specifically, I owe a large debt of gratitude to Dr. Carolyn Halladay, for her endless support, guidance, mentorship, and friendship during this process. Her insight, direction, and inspiration have made this thesis writing process both enlightening and enjoyable. I am also indebted to Dr. Erik Dahl for his guidance during my early quarters at the Naval Postgraduate School, which developed my understanding for the complex world of the Homeland Security environment.

I owe the largest debt to my beautiful wife, Kendra, and my two daughters, Brianna and Ashlyn, for their continued sacrifice during my career endeavors, and understanding during my absences. I would also like to thank my parents, Tom and Elaine Bock, for teaching me the value of hard work.

THIS PAGE INTENTIONALLY LEFT BLANK

I. POST-CONFLICT OCCUPATION AND TRANSITIONAL JUSTICE

On December 30, 2005, the world watched in anticipation as Saddam Hussein was put to death by the government of a free Iraq. Within days, the video of Hussein's death went viral on the Internet. The pixelated video captures an unstable Hussein, escorted by three masked men; a noose is placed around his neck. Guards and observers chant: "Go to hell," and "You killed Iraq." As Saddam begins to pray, a quiet man pleads to the audience: "Please stop, this man is facing execution."

The chanting stops, but the testy exchange seems to please the deposed dictator. Saddam starts to recite the second verse of the Shahada, an Islamic prayer; the scaffold flooring is released, and he falls to his death. The onlookers erupt in a Shia prayer, this time with no response in the Sunni version from Saddam. The tone of the video is clear: The legal execution of Saddam was conducted with anger, hatred, and sectarian vengeance. The animosity of the witnesses, guards, and executioners leaves the viewer in doubt as to whether the execution was justice or murder. The circumstances of the Al-Dujail trial and legal execution of Saddam present fundamental questions of the ethics of post-conflict justice within the new Iraqi regime.¹

A. NUREMBERG TO IRAQ: HIGH ROAD OR DUSTY TRAIL?

The purpose of this thesis is to review post-conflict justice transformation within Iraq following the U.S. invasion, in particular, the legitimacy of the Iraqi High Criminal Court (IHCC) and its first deliberation, the Al-Dujail trial, in which Saddam was one of eight co-defendants. Ultimately, this thesis questions how the United States can strategically infuse transitional justice through Western forms of judicial procedures into the democratic transition of non-Western nations under U.S. military occupation.

This thesis examines the successes—and the simmering discontents—of Nuremberg as a model of transformative, post-conflict justice. It also takes up the much

¹ Video of the Execution of Saddam Hussein with English subtitles, accessed May 5, 2012. <http://www.liveleak.com/view?i=8979cac556>.

cloudier legacy of the Tokyo Trials, where the internal contradictions of this approach gathered force in the non-Western context and laid bare the shortcomings of the Nuremberg model and the stories that the West tells about it to this day. This thesis reviews the historical context of judicial proceedings for nations under U.S. military occupation in order to evaluate whether justice can be transitional. Furthermore, this thesis examines the historical use of Western procedural judicial proceedings in non-Western substantive judicial societies.

The analysis then turns to more contemporary cases, notably Iraq. The United States continued to embrace (and espouse) the Nuremberg model as it marched into Iraq in the summer of 2003. Something rather different came of the Iraqi tribunal, however. In all, the methods of transitional justice under the Coalition Provisional Authority (CPA) and the subsequent Iraqi Special Tribunal (IST) trial of Saddam Hussein demonstrated many of the infirmities that the earlier tribunals at least implied—with consternating consequences for both the United States and the new Iraqi government.

B. CULTURAL PERCEPTIONS OF JUSTICE

Part of the difficulty with establishing any kind of universally recognized and accepted model of transformative justice are the issues of culture. Within Western democratic nations, the fairness and perceived justice of the law hinges on the legal process rather than the outcome of a given case. Under American occupation, the restoration of peace depends on this procedural nature of justice.² However, the perception of justice in a non-Western culture is based primarily on outcome, that is, the nature of justice is substantive, and success is predicated on the results of judicial proceedings rather than the fairness of the process. These different perceptions are a part of cultural narratives that are as central to their respective societies as the collective identity or the ethical core.

² James E. Baker, *In the Common Defense: National Security Law for Perilous Times* (New York: Cambridge University Press, 2007). See esp. chap. 1, “Introduction.”

Legal scholars note that Western legal procedure has “a poor sociological fit with the non-Western societies to which it is applied.”³ For example, the International Military Tribunal (IMT) at Nuremberg established the legal basis of superior or command responsibility, in which military and political leaders can be criminally responsible for the actions of subordinates, even if the leader is physically removed from the criminal conduct. The responsibility of leadership for wartime actions has been rooted within international law since the Nuremberg trials. In contrast, similar precedent has not been followed in non-Western cultures. Many societies have failed to link superior responsibility for criminal activity in such cases as spiritual leaders, charismatic authorities, or individuals believed to have mystical powers. In such cases, many non-Western cultures have preferred to punish the individual who committed a crime, in lieu of the supervisor who may have ordered the illegal activity.⁴

This thesis does not concern itself with the guilt or innocence of the former Iraqi dictator in the Al-Dujail case or the justification for U.S. intervention. The purpose is to document how the Coalition Provisional Authority (CPA) established legal jurisdiction, and to review the issues surrounding the IHCC’s trial of Saddam Hussein. Furthermore, this thesis suggests judicial processes that could be usefully employed within non-Western cultures to support transition from an insurgent post-conflict environment to peace, stability, and justice for all.

C. TRANSITIONAL JUSTICE

Since World War II, the U.S. experience with regimes that deliberately use prolonged violence and terror against their own citizens confirms that post-conflict justice is a necessary tool for democratization. The U.S. prosecutors at Nuremberg sought to develop a manner of justice that would instill in defeated—but still Nazified—Germany the concept of individual accountability, the basis of Western, democratic law

³ Tim Kelsall, “International Criminal Justice in Non-Western Cultures,” *Oxford Transitional Justice Research Working Paper Series*, April 12, 2010, accessed August 28, 2012, http://www.csls.ox.ac.uk/documents/Kelsall_InternationalCriminalJustice_Final.pdf.

⁴ Geert-Jan A. Knoops, “The Transposition of Superior Responsibility onto Guerrilla Warfare Under the Laws of the International Criminal Tribunals,” *International Criminal Law Review*, vol. 7, no.2, April 1, 2007, 505–529.

(and a sharp contrast to Nazi notions of collective guilt, racial “fate,” or categories of the population on whom the laws worked differently). Western, democratic legal procedure—due process in its vernacular sense—centers on the individual as legal actor. Secretary of War Henry Stimson argued at the time that a just enforcement of the law requires that “[the] defendant be charged with a punishable crime; that he have full opportunity for defense; and that he be judged fairly on the evidence by a proper judicial authority. Should it fail to meet any one of these three requirements, a trial would not be justice.”⁵ And justice, as a transformative act by which to found the new, peaceful, postwar West Germany, was the aim and the end of the IMT.

Since the trials of Nuremberg and Tokyo, the use of justice as a transition to democracy remained largely unused until the early 1990s, mainly due to the bipolar balance of power during the Cold War, where the enemy of my enemy counted as a friend, whatever his human-rights record might be, and regime change happened under specific circumstances.⁶ After the fall of the Soviet Union, the United Nations began to prosecute individuals through the process of an International Criminal Tribunal (ICT). Examples include the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993, and the International Criminal Tribunal for Rwanda (ICTR) in 1994. Furthermore, the United Nations provided oversight for specialized courts in Sierra Leone, Kosovo, East Timor, and Cambodia.

Following the first Gulf War, Saudi Arabia and other Middle Eastern countries called on the Arab League of Nations to prosecute war crimes that occurred during Iraq’s

⁵ Henry L. Stimson, “The Nuremberg Trial: Landmark in Law,” ed. Guenael Mettraux, *Perspectives on the Nuremberg Trial*. (New York: Oxford University Press, 2008), 618. In Stimson’s capacity as Secretary of War, he was in control of the U.S. occupation zone in Germany. Stimson led the opposition of the Morgenthau Plan, which would de-industrialize Germany and divide the country into small, dependent states that could be monitored and mentored as they carefully developed toward democratic modernity without any capacity to menace their neighbors or dominate Europe in any regard. Fearing the devastating economic conditions of de-industrialization, Stimson supported the IMT as means to establish proper judicial proceedings for the prosecution of war criminals

⁶ Madoka Futamura, *War Crimes Tribunals and Transitional Justice: The Tokyo Trial and the Nuremberg Legacy* (New York: Routledge, 2008), 38-41. Scholars believe the bi-polar nature of the Cold War limited western intervention of non-democratic nations that were subject to the abuse of human rights. Following the fall of the Soviet Union, the United Nations began to prosecute individuals through the process of an International Criminal Tribunal (ICT). Examples include the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993, and the International Criminal Tribunal for Rwanda (ICTR) in 1994. Furthermore, the United Nations provided oversight for specialized courts in Sierra Leone, Kosovo, East Timor, and Cambodia.

occupation of Kuwait. The request to try the Ba’ath Regime for war crimes in 1991 was rejected by the United States, under the Clinton administration. An informal commission was created to investigate possible war crimes of the Ba’ath Regime in Kuwait, but even this effort was abandoned in 1997 amid political pressures from the other permanent members of the United Nations Security Council.⁷

In 2002, the Department of State (DOS) established a working group to address post-conflict justice issues in Iraq in the aftermath of the second Gulf War, including the use of *ad hoc* tribunals. The DOS working group was called the “Future of Iraq” Project, and its report, published in March 2003, provided the blueprint of transitional justice as it applies today. The report’s section on “Transitional Justice in Post-Saddam Iraq” defines transitional justice as a plan “aimed at transforming an unstable and chaotic state, caused by a dictatorship with a legacy of gross human rights abuses, to a democratic pluralistic system which respects the rule of law.”⁸ The premise for the DOS document on transitional justice is to ensure that the rule of law applies to all persons within the state—to include the head of state—and citizens within a post-conflict environment have a credible means to address grievances. The purpose of the occupation force is to establish the means of justice resolution in order to avoid, “self-help justice characterized by acts of vengeance.”⁹ The DOS plan for transitional justice includes four distinct components necessary to achieve a successful transition to the democratic rule of law: 1) truth, accountability and reconciliation; 2) legal reform; 3) institutional reform; and 4) public education and awareness. The cornerstone to the DOS plan is an open and fair trial for individuals suspected of committing crimes against humanity.¹⁰

⁷ M. Cherif Bassiouni, “Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal,” *Cornell International Law Journal*, Vol. NN, 112-113. UN opposition to the investigation is believed to be a matter of economic interest for nations of the Security Council. In particular, France, Russia, and the UK had significant ties to the Ba’ath regime in the mid 1990s, and China protested that such investigation would violate national sovereignty.

⁸ U.S. Department of State, *Transitional Justice in Post-Saddam Iraq: The Road to Re-establishing Rule of Law and Restoring Civil Society: The Future of Iraq Project, Working Group on Transitional Justice*, (March 2003), 5.

⁹ *Ibid.*, 4.

¹⁰ *Ibid.*

The tenets of the DOS plan, however, do not eventuate automatically. Instead of a smooth transition to democracy, the beginning of the U.S. occupation was cluttered with disorder, looting, and a general lack of public security. As it turned out, the IHCC's one-dimensional approach to transitional justice—through the demonstrative trial of Saddam Hussein—further escalated sectarian separation and biases within Iraq, and most likely influenced the escalation of violence for more than five years following Saddam's execution. Ultimately, the tribunal failed to provide the basis of lasting legal reform, institutions for reconciliation of grievances, public awareness, and the documentation of truth through a validated and accurate historical record. In contrast, properly imposed methods of transitional justice could have influenced societal unity, healing for victims of the regime, and possibly reduced the ethnic tension and violence.

D. THESIS OVERVIEW

As the United States advances its worldwide contingency mission against terrorism, it will remain under international scrutiny for methods and practices of judicial processes, particularly where it seeks to establish (and prosecute) individuals in order to establish a Western method of transformative justice. Since Nuremberg, the use of military occupation for post-conflict reconstruction has been founded on the legacy model of military tribunals. This thesis examines the use of military tribunals for transitional countries under U.S. occupation in order to evaluate the effectiveness of procedural justice. The thesis questions the legacy of the Nuremberg as a model, and the use of International Military Tribunals as a pragmatic tool for military counterinsurgency operations. The misuse of judicial proceedings within an insurgent environment can be detrimental to the transformative process. Furthermore, the post-occupied partner nation can be left with the sour taste of victors' justice, which not only casts discredit on post-conflict institutions of justice, but also strains relations with the occupying nation.

The trial and punishment of the Nazi regime through an international process of the IMT established the foundation and jurisprudence of international tribunals, thus becoming the benchmark for modern transitional justice. This present work reviews the strategic objectives of Nuremberg and principles of the tribunal that have significantly influenced the international legal environment. Then the analysis turns to the criticism of

the IMT and the legacy of Nuremberg upon the judicial proceedings within non-western cultures under U.S. occupation and a re-examination of the Nuremberg process as it was replicated in Japan. The historical case study of the Tokyo Trials emphasizes these points of disconnection, disaffection, and distortion of the trial and the outcome that the experience of Nuremberg only suggested. In this context, the normative view of universal justice for war criminals, based on the fairness and politicization of the tribunal process, is of particular note.

From Tokyo, this thesis proceeds to Iraq and the proceedings for the criminal charges against Saddam Hussein. Although the trial of Al-Dujail was conducted under domestic jurisdiction of the IHCC, the process was deeply rooted in the elements of international law established at Nuremberg. Furthermore, the 50-year separation of this case study from Nuremberg and Tokyo requires a more detailed review of the international legal norms, customary law, and treaty obligations established since the end of World War II. The thesis reviews the limitations of U.S. occupation forces in Iraq, which were not present during the Allies occupation, and how such limitations affected the IST.¹¹

In conclusion, this thesis will review the United States' use of democratic forms of justice and the lessons learned by international tribunals that attempt to enforce legal norms of justice for war criminals. Then it recommends a method for a U.S. military occupation force to successfully transition non-western nations from "an unstable and chaotic state, caused by a dictatorship with a legacy of gross human rights abuses, to a democratic pluralistic system which respects the rule of law."¹²

For the purpose of this thesis, the evaluation of transitional justice will focus on the manner and methods by which the occupation authority prosecutes and tries the members of the prior regime for major crimes. The ultimate determination of the

¹¹ There were four successful international tribunals before the establishment of the International Criminal Court (ICC) in 2002. Those include the IMT at Nuremberg, the IMT-FE, the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993, and Rwanda (ICTR) in 1994. Furthermore, the United Nations provided oversight for specialized courts in Sierra Leone, Kosovo, East Timor, and Cambodia. This thesis may reference these tribunals, however, the case study selection excludes a detailed review of these cases due to the lack of involvement of U.S. forces as an occupational authority.

¹² U.S. Department of State, *Transitional Justice in Post-Saddam Iraq*, 5.

efficacy of transitional justice is the accountability for violators of international laws and norms. While the ultimate goal is to establish the truth concerning such violations, the purpose of the tribunal process is to gather facts, determine accountability, and prove guilt beyond a reasonable doubt—a more circumspect mandate, perhaps, suffused in the procedure-is-justice view of the established western democracies.

This disconnect between the political and societal ambitions for tribunals versus the actual potential (and limits) of the tribunal process sets the stage for the uneven results that tribunals have had in terms of both transition and justice. As this thesis demonstrates, the problem is exacerbated by the conventions and assumptions of Western legal practice, especially when it is transplanted to a non-Western context. Nuremberg may not be a vestige of a particular time and place, but the context does matter to the ultimate outcome of any transitional-justice project. The pages that follow illuminate this context to bring into relief those policies and practices that may secure the blessings of the Nuremberg model for the United States and its partners alike, while resolving the tensions and conflicts that have beset the tribunal approach, especially in recent years.

II. THE NUREMBERG TRIALS

The legacy and the logic of Nuremberg was revitalized in the early 1990s, when the United Nations used *ad hoc* tribunals to enforce international customary law in Yugoslavia and Rwanda. Furthermore, the establishment of the International Criminal Court in 2002 demonstrates the significant contribution of the Nuremberg model toward establishing international accountability for individual criminal acts. But what was the IMT in its own time? And how much of the model was realized in the original transitional tribunal?

A. ESTABLISHING THE LEGACY OF NUREMBERG

Even before the United States entered into World War II, the ideal of justice as a means to resolve hostilities in Europe occupied U.S. leaders planning already for the post-war peace. As U.S. soldiers joined the fight against the Axis Powers in Europe and the Pacific, American judicial leaders worked to develop the legal methodology to engage the international community in order to establish an independent, impartial, and legitimate judicial process, specifically to try those who committed crimes during the war.

National Socialist rhetoric and action became more extreme—and lawless—as the war went on, particularly when the momentum of victory started to shift against the Germans. When in 1942 Operation Barbarossa failed to produce a Nazi triumph over the Soviet Union, the war in Europe became a war of annihilation between Hitler's Third Reich and Stalin's USSR, echoed in the Nazis' launch of the most lethal stage of the Holocaust. Meanwhile, by now, the Western allies recognized that the totalitarian ideologies of the Axis powers were mutually exclusive of democracy. The scope and scale of the post-war project expanded, including the role of justice in the fundamental transformation of the aggressors and, in fact, the European order that, to some minds in

Washington, gave rise to such extremism and violence. The new and peaceful Germany required a founding act of transformative justice.¹³

Beginning in 1942, the leaders of the so-called Big Three (the United States, Britain, and the Soviet Union) as well as representatives of nations occupied by the Nazi regime gathered variously to discuss post-conflict resolution for the aggressive war waged by the Third Reich. After three conferences, Tehran (1943), Yalta (1945), and Potsdam (1945), the Big Three agreed on a legal forum for punishment of the Nazi powers. On August 8, 1945, the United States, the United Kingdom, the French Republic, and the Union of Soviet Socialist Republics signed the London Agreement, establishing the International Military Tribunal trial and punishment of the Nazi war criminals.¹⁴ This IMT took up its work in the Palace of Justice in the northern Bavarian city of Nuremberg. Known as the Nuremberg trials, the IMT prosecuted the most prominent members of the political, military, and economic leadership of the Nazi regime, with indictments against twenty-four individuals and seven organizations deemed to represent the very top echelons of the Nazi party and state.¹⁵

Article Six of the Nuremberg Charter establishes the “triple strata” of serious crimes within international law: crimes against peace, war crimes, and crimes against humanity.¹⁶ Proponents argue that Article Six transformed the future discourse of international law by establishing individual accountability for international crimes.¹⁷ This article of the Charter dispenses with both collective guilt (which notion is at odds

¹³ Henry L. Stimson, “Memorandum Opposing the Morgenthau Plan: 9 Sept. 1944,” in *The Nuremberg War Crimes Trial 1956-1946: A Documentary of History*, ed. Michael R. Marrus, (Boston and New York: Bedford/St. Martin's, 1997), 26–27.

¹⁴ See the London Agreement of August 8th, 1945, <http://avalon.law.yale.edu/imt/imtchart.asp>.

¹⁵ United Nations, Charter of the International Military Tribunal—Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (“London Agreement”), August 8, 1945. Referred to as: UN, *Charter of the International Military Tribunal*.

¹⁶ *Ibid.*

¹⁷ See, for example, the remarks of Warren R. Austin, Chief Delegate of the United States, in his opening address to the United Nations General Assembly in October 1946: “[The IMT] makes planning or waging a war of aggression a crime against humanity for which individuals as well as nations can be brought before the bar of international justice, tried, and punished.” Reported in Quincy Wright, “The Law of the Nuremberg Trial,” in *The American Journal of International Law*, vol. 41, no. 1 (January 1947), 38. (Citing a New York Times article as its source). The author notes further that President Truman had made similar comments.

with Western jurisprudence in the first place and which would have had the curious effect of lessening the culpability of any individual perpetrator because 70 million Germans, or perhaps 8.5 million Nazi party members, would share the guilt under such a scheme) and sovereign immunity (which protects statesmen from prosecution for *legitimate* and *lawful* official decisions made while in office). Per Article Six, defendants at Nuremberg were officially and individually charged with punishable crimes.¹⁸

Proponents of the tribunal insist that the fairness of the proceedings was unquestionable. By the terms of the IMT Charter, defendants were allowed to cross-examine witnesses, speak on their own behalf, and directly address the members of the tribunal.¹⁹ “In their insistence on fairness to the defendants, the charter and the tribunal leaned over backwards.”²⁰ Section IV of the tribunal’s charter establishes the rights of the defendants. Proponents of the legacy believe the fairness of the trial was guaranteed through proper counsel and defense. Under the charter, those accused had the right to disclosure, provided proper counsel, and the ability to conduct his own defense of the evidence against him. Stimson argued that under Section IV, “we gave the Nazis what they had denied their own opponents—the protection of the law. The Nuremberg tribunal was thus in no sense an instrument of vengeance but the reverse.”²¹

The first trial—the one most commonly considered the Nuremberg trial, though actually several took place in this venue—ran from November 20, 1945, until October 1, 1946, and ended with convictions for 19 defendants (of the 22 originally named) and sentences ranging from 10-year prison terms (Admiral Karl Dönitz, the head of the German Navy who took over as German president following Hitler’s suicide) to life terms (Rudolf Hess, Hitler’s deputy) to death by hanging for such Nazi luminaries as Reichsmarschall Hermann Göring, ideologist Alfred Rosenberg, chief of the Wehrmacht

¹⁸ In the event, the Nuremberg indictments contained four counts—the three named international crimes plus the common plan or conspiracy to commit them, which was Count 1. The defendants were charged variously among the four counts, depending on their role in the Nazi state. See Table 1 in this thesis, below.

¹⁹ Cite to the charter here; see also, Wright, “The Law of the Nuremberg Trial,” 40.

²⁰ Stimson, “The Nuremberg Trial: Landmark in Law,” 622.

²¹ Stimson, “The Nuremberg Trial: Landmark in Law,” 617. The IMT tried 24 members of the Nazi regime; five were determined innocent or acquitted of charges, seven received jail sentences (three sentenced to life), and 12 were sentenced to death.

high command Wilhelm Keitel, and Foreign Minister Joachim von Ribbentrop.²² (The Soviet judge was on record at the time, griping that too few of the defendants were sentenced to death.²³) Tellingly, there were three acquittals (Hans Fritzsche, an official of the Propaganda Ministry who was charged in place of Joseph Goebbels; the former chancellor Franz von Papen, who stayed on as Hitler’s vice-chancellor for the early years of the Third Reich; and Economics Minister Hjalmar Schacht).²⁴ These results demonstrate the punctilious adherence to the rules of procedure that characterize all western notions of a fair trial—and get to the heart of the trial as a “demonstration model” of the rule of law in action.

The IMT went on to conduct 12 more trials of high-ranking German officials at Nuremberg. Each of the allied occupying powers also implemented war crimes proceedings, based on the precedent of Nuremberg. “Between December 1946 and April 1949, U.S. prosecutors tried 177 persons and won convictions of 97 defendants.”²⁵ Once the occupation ended formally, the West German government continued to try individuals for crimes committed during the Third Reich. In other words, the Nuremberg trials began a process in which the Germans, ultimately under their own power, began to come to terms with the Nazi past through judicial proceedings, thoroughly suffused in the rule of law.

²² Henry L. Stimson, Edward R. Stettinius Jr., and Francis Biddle, “Memorandum for the President: 22 Jan. 1945,” in *The Nuremberg War Crimes Trial*, ed. Michael R. Marrus. (Boston and New York: Bedford/St. Martin’s, 1997), 30-32.

²³ Wright, “The Law of the Nuremberg Trial,” 43

²⁴ Stimson, Stettinius, and Biddle, “Memorandum for the President: 22 Jan. 1945,” 57-780. Two defendants did not stand trial at all. Robert Ley, who headed the German Labor Front, committed suicide before proceedings could begin. Industrialist Gustav Krupp, in his 80s, was declared medically unfit for trial.

²⁵ The U.S. Army had begun conducting its own war crimes proceedings as early as April 1945, though these early proceedings were “entirely within the traditional concept of war crimes as specific acts against the laws and usages of war committed by soldiers during hostilities.” Earl F. Ziemke, *The U.S. Army in the Occupation of Germany, 1944–1949*, a volume in the Army Historical Series, edited by Maurice Matloff (Washington, D.C.: Center for Military History, 1975), p. 391. Combined Chiefs of Staff decisions later in the year expanded the categories of crimes brought to trial to include “battlefield crimes, offenses against Americans no matter where they were committed, and crimes relating to concentration camps and similar institutions.” *Ibid.*, 392. Eventually, under Control Council Law No. 10, the Army adopted the Nuremberg criteria and precedents in its war crimes proceedings, ultimately bringing charges in some hundreds of cases by 1949.

Name	Charge				Sentence	Notes
	1	2	3	4		
Bormann, Martin	I	-	G	G	Death	Nazi Party Secretary. Sentenced to death <i>in absentia</i>
Donitz, Karl	I	G	G	-	10 Years	Leader of the <i>Kriegsmarine</i> , initiated the U-boat campaign
Frank, Hans	I	-	G	G	Death	Reich Law Leader
Frick, Wilhelm	I	G	G	G	Death	Minister of the Interior, co-author of the Nuremberg race laws
Fritzsche, Hans	I	-	I	I	Acquitted	Head of the news division of the Nazi Propaganda Ministry
Funk, Walther	I	G	G	G	Life in Prison	Minister of Economics
Goring, Hermann	G	G	G	G	Death	Commander of the <i>Luftwaffe</i>
Hess, Rudolf	G	G	I	I	Life in Prison	Hitler's Deputy <i>Fuhrer</i>
Jodl, Alfred	G	G	G	G	Death	General of the <i>Wehrmacht</i>
Katlenbrunner, Ernst	I	-	G	G	Death	Highest surviving leader of the <i>SS</i>
Keitel, Wilhelm	G	G	G	G	Death	Head of <i>Oberkommando der Wehrmacht</i> (OKW)
Neurath, Constantin von	G	G	G	G	15 years	Minister of Foreign Affairs
Papen, Franz von	I	I	-	-	Acquitted	Chancellor of Germany 1932, Vice-Chancellor under Hitler 1933-1934
Raeder, Erich	G	G	G	-	Life in Prison	Commander In Chief of the <i>Kriegsmarine</i>
Ribbentrop, Joachim	G	G	G	G	Death	Ambassador and Minister of Foreign Affairs
Rosenberg, Alfred	G	G	G	G	Death	Leading Nazi theory ideologist
Sauckel, Fritz	I	I	G	G	Death	Plenipotentiary general for slave labor
Schacht, Hjalmar	I	I	-	-	Acquitted	Leading banker for the <i>Reichsbank</i>
Schirach, Baldur von	I	-	-	G	20 Years	Head of the <i>Hitlerjugend</i> , Reich youth leader
Seyss-Inquart, Arthur	I	G	G	G	Death	Reich Commissioner of occupied Netherlands
Speer, Albert	I	I	G	G	20 Years	Minister for Armaments and War production
Streicher, Julius	I	-	-	G	Death	Founder and editor of the anti-Semitic newspaper, <i>Der Sturmer</i>

Table 1. Nuremberg Defendants (After Marrus, 1997)

LEGEND: Charge: 1) Crimes against peace, 2) Waging wars of aggression, 3) War crimes, 4) Crimes against humanity. With respect to their charge, defendants were either: indicted but acquitted (I), indicted and found guilty (G), or not charged (-).²⁶

²⁶ Michael R. Marrus, *The Nuremberg War Crimes Trial*. See esp. Appendix, "The Defendants and Their Fate."

The trials at Nuremberg successfully transformed German society from the chaotic, repressive control of the Nazi regime, and established a democratic form of justice that upheld the rule of law. As historian Konrad Jarausch notes, “the Nuremberg trials were a necessary attempt to avenge by judicial means the ‘violation of the conventions of civilization’ wrought by the Nazis’ crimes.”²⁷ The lessons of Nuremberg even echo in the Federal German constitution, with its prominent and explicit affirmations of the German commitment to law, democracy, and human rights. Indeed, the preamble of the document begins by characterizing the German people as: “[c]onscious of their responsibility before God and man”²⁸ To advocates of this approach to justice-as-transformation, the experience of Nuremberg proves that international prosecution is not only feasible, but also capable of achieving transitional justice and reconciliation for the victims of war crimes.

Thus, the Nuremberg legacy was born.²⁹ Robert Jackson, serving as the chief U.S. prosecutor at the IMT, recognized both the promise and the peril of Nuremberg as a precedent for the future. During his opening statement to the tribunal, Jackson stated: “We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow.”³⁰ By most accounts, the past 65 years of transitional justice and its happily-ever-after-effects in Germany shows that Nuremberg should be viewed as “an episode that would leave an enduring judicial monument, to mark a giant step in the growth of international law.”³¹ It also became *the* universal model for transforming a war-torn society into a peaceful, democratic nation.

²⁷ Konrad H. Jarausch, *After Hitler: Recivilizing Germans, 1945–1995* (Oxford: Oxford University Press, 2006), p. 7.

²⁸ See the *Basic Law for the Federal Republic of Germany*, 2010 version, available as a download from the federal parliament: http://www.bundestag.de/htdocs_e/documents/legal/index.html .

²⁹ Futamura, *War Crimes Tribunals and Transitional Justice*. See esp. chap. 1, “Introduction.”

³⁰ Robert H. Jackson, *The Nurnberg Case: Together With Other Documents* (New York: Alfred A. Knopf, 1947), 33-34. See esp. chap. 3, “Opening Statement for the United States, November 21, 1945.”

³¹ Telford Taylor, *Nuremberg and Vietnam: An American Tragedy* (New York: New York Times Books, 1970), 80.

B. VICTORS' JUSTICE: THE LEADING CRITIQUE OF NUREMBERG

There is something almost sacrilegious to the suggestion that the Nuremberg trials may have had more than a whiff of victors' justice about them, but the allegation was at least whispered at the time and has persisted ever since—and not just in company that pines for its party badges and stiff-armed salutes. As Jarausch notes, contemporary observers of the trial “had little difficulty casting it as ‘the justice of the victors’ because Soviet crimes, such as the mass shootings of Polish officers in 1940 in the Katyn Forest, were also attributed to the Nazis.”³² Jurist Georg Schwarzenberger, for example, has compared the tribunal to wars in which the losing nation is subject to criminal trial by the winning side, meaning post-war tribunals are merely a form of victors' justice. (Hermann Goering, who represented himself before the IMT, also had argued the victors' justice point,³³ but Schwarzenberger, a German Jew who became an eminent legal scholar in Britain, can hardly be supposed to advance pro-Nazi apologia.) The first question that rises in this context is whether Nuremberg really was the transitional-justice event that it is conventionally held to be.

For one thing, there is the matter of judicial procedure, which, upon closer inspection, seems to have been less consistently practiced or enforced than the IMT's latter-day champions suggest. The Charter of Nuremberg, and IMTs in general, are organized to expedite judicial proceedings rather than preserve procedural methods of equality before the law as known in other fora. For example, Article 19 of the Nuremberg Charter states: “The tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative

³² Jarausch, *After Hitler: Recivilizing Germans*, 8.

³³ Wright, “The Law of the Nuremberg Trial,” 45.

value.”³⁴ This article, and the manner in which the Allies employed hearsay evidence with a low tolerance for technical procedures of Western justice have been highly criticized for a lack of justice for the defendants.³⁵

Nuremberg revisionists also point to the rather more modest and specific ambitions of the London Agreement at the time of its signing. Legal philosopher Hans Kelsen, for example, claims that this legislative treaty was not a multinational effort to establish a precedent for the future of international law; rather, the tribunal’s charter was designed in a manner that an individual nation would have administered such a trial.³⁶ In Kelsen’s view, the charter was not designed to modernize international cooperation or design an international court of justice: “[The] intent of the tribunal was to establish a joint military tribunal under municipal law rather than a truly international tribunal.”³⁷

Furthermore, the declaration of the London Agreement jumped to the conclusion that war is illegal, thus the very act of war constitutes a crime. For example, the Nuremberg trials overlooked the actions of a soldier under orders. The IMT criminalized inhumane acts of warfare by soldiers in a form of *ex-post facto* legislation, in which members of the Nazi regime were tried for crimes they had unknowingly committed. For example, before World War II the U.S. Department of War claimed the laws of warfare preserved the innocence for soldier’s actions while under orders of a superior. War Department Field Manual 27-10, *Rules of Land Warfare*, dated October 1, 1940, stated:

³⁴ UN, *Charter of the International Military Tribunal*. This arguably looser procedural standard came to apply to the courts of the U.S. military government in occupied Germany, as well. Whereas military “commissions operated under the elaborate regulations for courts martial [...], the] regulations for military government courts, on the other hand, specified: ‘... rules may be modified to the extent that certain steps in the trial may be omitted or abbreviated so long as no rights granted to the accused are disregarded. [...] No greater formality than is consistent with a complete and fair hearing is desirable and the introduction of procedural formalities from the Manual of Courts Martial or from trial guides based thereon is discouraged except where specifically required by these rules.’” Ziemke, p. 393.

³⁵ Arthur L. Goodhart, “The Legality of the Nuremberg Trials,” in *Perspectives on the Nuremberg Trial*, ed. Guenael Mettraux, (New York: Oxford University Press, 2008), 628.

³⁶ Hans Kelsen, “Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?” in *Perspectives on the Nuremberg Trial*, ed. Guenael Mettraux, (New York: Oxford University Press, 2008), 278.

³⁷ Schwarzenberger, “The Judgment of Nuremberg,” 168.

Individuals of the armed forces will not be punished for these offences in case they are committed under the orders or sanctions of their government or commanders. The commanders ordering the commission of such acts, or under whose authority they are committed by their troops, maybe punished by the belligerent into whose hands they may fall.³⁸

This statement was removed from U.S. military field manuals following the Nuremberg tribunals. Before the IMT, the individual action of a soldier in combat was protected domestically as a form of collective action and collective responsibility. The London Agreement challenged this norm with its claim of the individual responsibility of the Nazi leaders, thus prompting the critique of the tribunal as victors' justice through *ex post facto* legislation. Kelsen argues that the exclusion of domestic accountability supports the notion that “nobody will be tried by a court of his own state for murder on the ground that he, as a soldier, has killed in warfare an enemy soldier, even if the war has been declared illegal by an international tribunal.”³⁹ Kelsen argues, that the tribunal failed to indict and investigate members of the Allied powers in a manner that was strategically limited to safeguard the victors.

University Professor Reinhard Merkel furthers Kelsen's claims by providing specific examples within the tribunal in which members of the Nazi party attempted to vindicate themselves through the defense of *tu quoque*.⁴⁰ Defendants argued that their actions were necessary and practical during warfare—and no different then the acts of the Allied forces. For example, Admiral Donitz was accused of waging unrestricted submarine warfare by sinking merchant vessels in the Atlantic. His defense provided a counter claim that Donitz actions were consistent with the tactics used by U.S. Navy Admiral Nimitz, who employed U.S. submarines against Japanese merchant ships in the Pacific. Donitz' defense was *tu quoque*, claiming that “the Allies had engaged in

³⁸ U.S. War Department, *Field Manual 27-10: Rules of Land Warfare* (Washington: USGPO, 1 October 1940), 87. See esp. Chap. 11, “Penalties for Violations of the Laws of War.”

³⁹ Kelsen, “Will the Judgment in the Nuremberg,” 278.

⁴⁰ Defined by Merriam-Webster as: a retort charging an adversary with being or doing what he criticizes in others. “*Tu QuoQue*” is an appeal to hypocrisy, and attempt by the defense to discredit the charges on the premise that the opponent failed to act consistent with the position of the court.

identical practices with which Donitz was charged showed that the conventions of war had changed, and that now submarine warfare was legal.”⁴¹

Rather than risk the criminalization of Nimitz for his tactics against the Japanese, the tribunal chose to acquit Donitz of all charges. David Luban claims this example of selective justice demonstrates the problematic nature of victors’ justice: “It legalizes any crime committed by the vanquished provided the victor committed it as well,” thus the, “standards of conduct are driven down to whatever level of brutality the victors are willing to tolerate in themselves.”⁴² The Donitz acquittal demonstrates the lack of procedural equality during the Nuremberg military tribunal. If the Allies had charged and tried actions of their own for war crimes, the morality of the IMT would have been strengthened. Instead, the tribunal chose to avoid the application of universal justice, prosecuting only the Axis powers following the war.

The use of the IMT as a form of victors’ justice is demonstrated best by the words of Lord Justice Lawrence, when he interrupted a defendant, stating: “We are not sitting here in court to decide whether other powers have committed breaches of international law, crimes against humanity, or war crimes. Here we are dealing with whether these accused have committed such atrocities.”⁴³ In other words, sauce for the goose is only sauce for the gander when both birds are facing the soup pot.

C. THE NEVER-ENDING TRANSITION?

More broadly, there remains the question of the ultimate effect of the trials. Jarausch notes that “the horrific courtroom images of man individuals and organizations that were reported in newspapers, newsreels, and educational films [at the time] (“Death Mills”) did not fall entirely short of their intended effect. As a result, U.S. surveys discovered that roughly half of the German population considered the punishment of the perpetrators to be just.”⁴⁴ Where does that leave the other half?

⁴¹ David Luban, “The Legacies of Nuremberg,” in *Perspectives on the Nuremberg Trial*, ed. Guenael Mettraux, (New York: Oxford University Press, 2008), 660.

⁴² Ibid.

⁴³ Merkel, “The Law of the Nuremberg Trial,” 571.

⁴⁴ Jarausch, *After Hitler: Recivilizing Germans*, 8.

Jarausch writes that “the imperative of unflinching confrontation with war and genocide, imposed from the outside, triggered a defensive reaction”⁴⁵ among the Germans and thus limited the extent to which Germans in first two decades after the war, at least, came only “half-heartedly” to any kind of real reckoning about their share of Nazi culpability—which, arguably, forms the heart of any program of “never again.”⁴⁶ As Jarausch notes, the West Germans did not establish a central documentation office for prosecutions of National Socialist crimes until 1958—more than a decade after the first Nuremberg tribunal wrapped up its business.⁴⁷ The delay does not bespeak an ardent embrace of the judicial method of de-Nazification. It took another five years before this German authority convened a trial of several persons charged with crimes at the Auschwitz death camp complex.

Today, despite the habitual sensitivities to the past among Germans, few observers seriously concern themselves with a Nazi resurgence in the Federal Republic of Germany, but this development may owe as much to the passage of time, prolonged exposure to western-style liberal-democracy, and the long post-war German prosperity as to the dubious effects of the IMT.

⁴⁵ Ibid., 270.

⁴⁶ The un-done aspect of the German sense of German history continues to come up in the public discourse, whether in the much-discussed “historians’ debate” of the 1980s—a reliable summary and even-handed analysis in English appears in Charles S. Maier, *The Unmasterable Past: History, Holocaust, and German National Identity* (Cambridge, MA: Harvard University Press, 1988)—to the more recent musings by prominent German politicians about the efficacy of “multiculturalism.”

⁴⁷ Jarausch, *After Hitler: Recivilizing Germans*, 270.

THIS PAGE INTENTIONALLY LEFT BLANK

III. THE TOKYO TRIALS

The legacy of Nuremberg neither accounts for nor even really acknowledges the proceedings of Japanese war criminals at the International Military Tribunal of the Far East, even though both tribunals—and both societal transitions—occurred more or less at the same time. The Nuremberg paradigm failed to translate completely even in 1946. As noted by scholar Guenael Mettraux: “The profoundly critical dissenting opinions of some of the judges in Tokyo and the overbearing nature of General MacArthur’s involvement in the proceedings have done much to weaken the fragile sense of judicial independence that had been safeguarded at Nuremberg.”⁴⁸

A. DEFEAT AND TRANSITION

By surrendering to the Allies on September 2, 1945, the Japanese bound themselves by the conditions of the Potsdam Declaration. Article 10 of the Declaration states that “stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners.”⁴⁹ U.S. occupation forces began arresting individuals suspected of war crimes as early as September 11, 1945. General Tōjō Hideki, the Prime Minister during the attack on Pearl Harbor, was the first Japanese citizen arrested under the American occupation. In all, more than 100 individuals were arrested between September and December 1945, suspected of major war crimes.

The decision to initiate judicial proceedings for war criminals was approved in December 1945, in Moscow. During the Moscow Conference, the Allied leaders designated General MacArthur as the Supreme Commander for the Allied Powers (SCAP) and granted him the authority to conduct a military tribunal in Japan. The Charter for the IMT-FE was officially established by a special proclamation of General MacArthur on January 19, 1946.

⁴⁸ Mettraux, *Perspectives on the Nuremberg Trial*, xviii.

⁴⁹ Kobori Keiichiro, *The Tokyo Trials: The Unheard Defense* (Tokyo: Kodansha Ltd., 1995), 3. The Potsdam Declaration was signed on July 26, 1945. The purpose of the declaration was to address the war strategy and post-war policy for Japan. The declaration was signed by President Truman, Prime Minister Churchill, and President Chiang Kai-shek (Republic of China).

MacArthur's Tokyo Charter deviated little from the model used at Nuremberg. The charter established the jurisdiction of the tribunal, including the classification of defendants into three categories: Class A, Class B, and Class C. Designation of Class A status was reserved for the highest political and military leadership within the Japanese empire and charged specific members of the government with crimes against peace and humanity. The indictment process began in March 1946. By April 29, 1946, some 28 men had been charged with Class-A criminal activity—17 military officers, four prime ministers, and other political members of the Japanese war cabinet.

The selection of defendants was a means of post-conflict reconstruction for the U.S. occupation of Japan. The strategic purpose of the tribunal was to place the responsibility of the war squarely on those leaders who “deceived and misled the people of Japan into embarking on world conquest.”⁵⁰ The list of defendants had one glaring mission: Based on the decision of MacArthur, Emperor Hirohito was not indicted. By maintaining the integrity of the Emperor, MacArthur and the prosecution team sought to create an emotional association among the citizenry that would “facilitate the strategic enterprise that was the Occupation. In retrospect, this elaborate propaganda campaign was immensely successful. The Japanese fell for it hook, line, and sinker.”⁵¹ The Americans preferred a pet emperor who could lead his people into a peaceable post-conflict order.

By extension, the tribunal process attempted to distinguish the everyday citizens of Japan from their political and military leaders with imperial aspirations. During his opening statement to the tribunal, lead prosecutor Joseph Kennan stated: “We must reach the conclusion that the Japanese people themselves were utterly within the power and forces of these accused, and to such extent, were its victims.”⁵² Critics of the IMT-FE point first to the prosecutors' aim to separate the citizens (along with their *Tenno* or “heavenly sovereign”) physically and emotionally from the autocracies committed by the wartime leadership. Unlike the Germans, who internalized the ideal of individual

⁵⁰ Ibid., 9. Based upon the Potsdam Declaration, Article 6.

⁵¹ Ibid.

⁵² Joseph Kennan quoted in Futamura, *War Crimes Tribunals and Transitional Justice*, 57.

accountability to the extent that even today, military officers are schooled at length in the personal and institutional ethics of maintaining and serving German democracy, the Japanese people seem to take an arm's-length view of Japan's role in World War II—even though such events as the brutal occupation and exploitation of China or the Philippines required the efforts of more than a handful of twisted men. In all, western observers report, it seems as though the Japanese have developed a form of historical amnesia toward their past aggressions.⁵³

Either way, the Japanese people were not the only victims of Japanese imperialism in Asia. The second major critique of the IMT-FE was the tribunal's failure to address the grievances of other Asian nations that were subjugated to the Japanese colonial rule (for example: Korea, China, and New Guinea). The historical record of the tribunal proceedings did not address war crimes against neighboring Asian nations and offered no reconciliation for the Japanese brutish use of force, demonstrating a lack of victim's justice.

The victors, on the other hand, seemed to critics to be front and center in the proceedings and the outcomes. In the third place, indeed, the IMT-FE has been criticized as a form of an American political agenda to rationalize the Allied conduct of the justified war. As written by B.V.A. Roling, the Dutch judge, the decision for the tribunal was “desired to show the American people and the world the criminal treachery of the attack on Hawaii.”⁵⁴ This effort was clearly demonstrated by the prosecution's selection of political and military officials directly linked with the decision to attack at Pearl Harbor.

Essentially, the Tokyo trials have been criticized as a political means of transitional justice to ensure the dictation of the western view of the historical record. The established history was used later by the occupation force as a psychological campaign for democratization and demilitarization of Japanese culture. The U.S. prosecution's focus on the Allied war, coupled with neglect for the Asian victims of the savage Japanese imperialist military proves the occupation force had little concern for

⁵³ Ian Buruma, *Wages of Guilt* (New York: Penguin Books Ltd, 1995). See esp. Chapters “Hiroshima” and “Nanking.”

⁵⁴ Roling quoted in *War Crimes Tribunals and Transitional Justice*, 59.

victim's justice. While the Tokyo Trials were created within the legacy of the Nuremberg model, the execution of the IMT-FE provided divergent results. The judicial precedence that was safeguarded in post-war Germany was clouded by the application of victors' justice in the Pacific.

B. THE TOKYO JUDGMENT

The tribunal consisted of judges from 11 nations, nine of which were signing members of the Japanese Instrument of Surrender.⁵⁵ The remaining two judges were representatives from India and the Philippines. Thus, like the trials at Nuremberg, the judges of at Tokyo were all members of the victor nations. Culturally, they were largely western, however, and this fact played out differently in the Japanese case than it did in Germany. An example was the “trial’s presence of major colonial powers in Asia—including Britain, France, and the Netherlands—sitting judgment over Japan’s own colonial ambitions.”⁵⁶ In the Tokyo trials, these leading western powers did not necessarily stand for democracy or progress; they represented a part of the problem that Japan’s leaders in the 1930s had tried, however ham-fistedly, to address. Even before the tribunal proceedings Justice Pal wrote: “The apprehension is that the members of the tribunal being representatives of the nations which defeated Japan and which are accusers in this action, the accused cannot expect a fair and impartial trial at their hands and consequently the tribunal as constituted should not proceed with this trial.”⁵⁷

Moreover, some of the powers represented on the tribunal seemed to contemporary observers to pose undue threats to basic due process and, therefore, to a fair outcome. Thus, defense attorneys argued against the selection of judges from three particular nations—Australia, Russia, and the Philippines. The Australian government had selected Sir Webb, who had served previously as an investigator and prosecutor of Japanese violations of the Hague Convention Law of War in New Guinea. The

⁵⁵ The signing members of the surrender: Australia, Canada, China, France, Great Britain, the Netherlands, New Zealand, the Soviet Union, and the United States.

⁵⁶ Allison M. Danner, “Beyond the Geneva Conventions: Lessons From the Tokyo Tribunal in Prosecuting War and Terrorism,” *Virginia Journal of International Law*, vol. 46, 89.

⁵⁷ Watanabe Shoichi, *The Tokyo Trials and the Truth of “Pal’s Judgment”* (Tokyo: PHP, 2009), 2.

defendants argued this was a clear conflict of interest, that Sir Webb investigative experience in New Guinea tainted his perceptions of the Japanese use of military force and he was predisposed with the determination that the defendants had committed war crimes. Even more problematic to the defense's case was Colonel Delfin Jaranilla of the Philippines, who was a former prisoner of the Japanese and a survivor of the Bataan death march—who might thus be presumed to be irretrievably hostile to all Japanese. Finally, the defense opposed the selection of Major General I.M. Zaryanov of Russia who was unable to speak Japanese or English, for criticism that he would create confusion and misunderstanding during the courtroom translation process.

The trials proceeded as planned, despite these objections. The trials took place from May 3, 1946, until April 16, 1948. The judgments of the tribunal took over seven months. The verdict and sentencing began on November 4, 1948, in which all defendants were found guilty.⁵⁸ Seven of the defendants were sentenced to death, including General Tōjō. The remaining defendants received prison sentencing, all but two of which were sentenced to 20 years or more.

To be sure, the judgment was not unanimous. Only nine of the 11 judges supported the majority decision. There were five separate opinions published by the judges; two of them were the dissenting opinions of Justice Henri Bernard (France) and Justice Radhabinod Pal (India). Each of the written opinions provided objections to the sentencing of the defendants. The Philippine judge, Jaranilla, criticized the sentences for being too lax, claiming such light punishment failed to provide a deterrent effect for the future. B.V.A. Roling, the justice from the Netherlands, opposed the death sentence for the only civilian of the tribunal, Prime Minister Hirota Kōki. The president of the tribunal, Judge William Webb from Australia, criticized the tribunal for failing to judge Emperor Hirohito.

⁵⁸ Only 25 of those charged received a guilty verdict; two of the defendants died during the tribunal process and one discharged for a mental disorder.

Name	Charge				Sentence	Notes
	1	2	3	4		
Araki Sadao	G	G	I	I	Life in Prison	Military General
Doihara Kenji	G	G	G	I	Death	Military Commander/General
Hashimoto Kingoro	G	G	I	I	Life in Prison	Military Colonel
Hata Shunroku	G	G	I	G	Life in Prison	Military Field Marshall
Hiranuma Kiichiro	G	G	I	I	Life in Prison	Prime Minister, Privy Council
Hirota Koki	G	G	I	G	Death	Ambassador to USSR, Foreign Minister
Hoshino Naoki	G	G	I	I	Life in Prison	Director of General Affairs
Itagaki Seishiro	G	G	G	I	Death	Military General
Kaya Okinori	G	G	I	I	Life in Prison	Minister of Finance
Kido Koichi	G	G	I	I	Life in Prison	Minister of Education and Welfare
Kimura Heitaro	G	G	G	G	Death	Military General
Koiso Kuniaki	G	G	I	G	Life in Prison	Military General, Prime Minister
Matsui Iwane	I	I	I	G	Death	Military General
Matsuoka Yosuke					Died in Prison	Foreign Minister, League of Nations
Minami Jiro	G	G	I	I	Life in Prison	Military General
Muto Akira	G	G	G	G	Death	Vice-Chief of Staff, Military Affairs
Nagano Osami					Died in Prison	Military Admiral
Oka Takasumi	G	G	I	I	Life in Prison	Chief of Naval Affairs
Okawa Shumei					Mentally Ill	Intellectual, Japanese militarist
Oshima Hiroshi	G	I	I	I	Life in Prison	Ambassador to Germany
Sato Kenryo	G	G	I	I	Life in Prison	Chief of Military Affairs
Shigemitsu Mamoru	I	G	I	G	7 Years	Ambassador to China, Foreign Minister
Shimada Shigetaro	G	G	I	I	Life in Prison	Military Admiral
Shiratori Toshio	G	I	-	-	Life in Prison	Ambassador to Italy
Suzuki Teiichi	G	G	I	I	Life in Prison	President, Cabinet Planning Board
Togo Shigenori	G	G	I	I	20 Years	Foreign Minister, Germany/USSR
Tojo Hideki	G	G	G	I	Death	Military General
Umezumi Yoshijiro	G	G	I	I	Life in Prison	Military General

Table 2. Tokyo Trial Defendants (After Futamura, 2008)

LEGEND: Charge: 1) Overall conspiracy, 2) Waging wars of aggression (either China, U.S., U.K., Netherlands, France, U.S.S.R at Lake Khassan or Nomonhan), 3) ordering, authorizing or permitting atrocities, 4) violations of the Laws of War. With respect to their charge, defendants were either: indicted but acquitted (I), indicted and found Guilty (G), or not charged (-).⁵⁹

⁵⁹ Futamura, *War Crimes Tribunals and Transitional Justice*. See esp. Appendix.

The most significant dissent came from Judge Pal, whose opinion drips with a skepticism of the great western powers that befits, perhaps, a leading figure from an India still under British rule. In his final opinion, Justice Pal protested the charges under the notion that war as a legitimate means of national security and was not unlawful prior to World War II. He also lambasted the tribunal as an exercise in *ex post facto* law that was neither democratic nor particularly just. As such, Pal wrote, he would have acquitted all the defendants. Of note, Pal's dissenting opinion was not read to the tribunal nor was it included in the historical record.⁶⁰

Following the tribunal, the Netherlands representative, Justice Roling challenged the appointment of judges, stating that, "neutrals and Japanese judges might have formed a counterpoint against the prevailing, and at the time almost undisputed, official attitudes of the victors."⁶¹ Echoing these sentiments, Judge Pal wrote:

A trial with law thus prescribed will only be a sham employment of legal process for the satisfaction of a thirst for revenge. It does not correspond to any idea of justice. Such a trial may justly create the feeling that the setting up of a tribunal like the present is much more a political than a legal affair, an essentially political objective having thus been cloaked by juridical appearance. Formalized vengeance can bring only an ephemeral satisfaction, with every probability of ultimate regret.⁶²

Ultimately, the verdict of the tribunal was approved by MacArthur, and, following a failed appeal, the seven defendants sentenced to death were executed on December 23, 1948. During the San Francisco Peace Treaty of 1951, the Japanese accepted the judgment of the IMT-FE, and the American occupation ended in 1952.

C. CONTEMPORARY PERCEPTIONS OF THE TOKYO TRIALS

The scholarly discourse and media coverage of the IMT-FE during the American occupation was highly censored. Under the centralized authority of General Douglas MacArthur, the legal analysis and opinion of sympathetic supporters for the defendants

⁶⁰ Madoka Futamura, *War Crimes Tribunals and Transitional Justice: The Tokyo Trial and the Nuremberg Legacy* (New York: Routledge, 2008), 54-55.

⁶¹ Bert V. A. Roling, "The Nuremberg and the Tokyo Trials in Retrospect," in *Perspectives on the Nuremberg Trial*, ed. Guenaël Mettraux, (New York: Oxford University Press, 2008), 464.

⁶² Shoichi, *The Tokyo Trials and the Truth*, 14.

were suppressed. MacArthur's control of information and reluctance to tolerate criticism of the tribunal and its process marked a significant deviation of the Nuremberg legacy.

Even MacArthur's considerable will could not silence all the critical voices, however, and after the U.S. occupation, scholars "began to spread the view that the victor nations had wrongfully punished the Japanese leaders for crimes they had never committed."⁶³ Justice Pal's dissenting opinion was published for the first time in Japan in 1952—after the United States ended its occupation.⁶⁴ Needless to say, his view that all 28 of the defendants should be acquitted sparked significant public reaction in Japan. For more than a decade following the U.S. occupation, Justice Pal led a campaign to discredit the verdict of Tokyo trials in Asia.⁶⁵

In 1971, author and history professor Richard Minear published his book, *Victors' Justice: The Tokyo War Crimes Trial*.⁶⁶ Translated into Japanese, the work expanded Justice Pal's claims about the judicial precedent of war as a crime, claiming that aggressive war was not an international crime before, during, or even following World War II. Therefore, Minear claims, the instigators of the IMTs at Nuremberg and the Far East could not claim "any legal foundations to carry out trials."⁶⁷ Rather, both tribunals were forms of victors' justice. While Western and Japanese scholars heavily criticized Minear's arguments as legally inadequate and significantly under researched, his claims of victors' justice resonated with in the United States—increasingly seized of the anti-war and "anti-imperialist" sentiments of the age—as well as Japan. Whatever the shortcomings of Minear's volume, it inspired further study into the tribunal's proceedings.

⁶³ Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II* (United States: Library of Congress, 2008), 218. See esp. Chapter 8: "The First Trial Analyst."

⁶⁴ The re-creation of the dissenting opinion of Judge Pal, published by Watanabe Shōichi in 2009, challenges the historical record of the tribunal in an attempt to vindicate the defendants of the Tokyo Trials and demonstrate the misuse of judicial procedures as a means of victors' justice. Shoichi, *The Tokyo Trials and the Truth*.

⁶⁵ Totani, *The Tokyo War Crimes Trial*, 218. See esp. Chapter 9: "Pal's Dissent and Its Repercussions."

⁶⁶ Richard H. Minear, *Victors' Justice; The Tokyo War Crimes Trial* (New Jersey: Princeton University Press, 1971).

⁶⁷ Totani, *The Tokyo War Crimes Trial*, 238.

Then in May 1983, a controversial documentary film, *The Tokyo Trial*, was shown in Japan. The film was based on the U.S. record of the tribunal that was maintained by the Department of Defense.⁶⁸ The documentary highlighted many contentious arguments of the defense council that were not included in the Japanese translation of the tribunal and were, thus, virtually unknown to the Japanese public. For example, defense attorney Ben Bruce Blakeney—whose arguments on May 14, 1946, were completely omitted from the Japanese record—commented that the nation that dropped an atomic bomb was not qualified to judge war criminals in a court of law.⁶⁹

If killing of Admiral Kidd by the bombing of Pearl Harbor is murder, we know the name of the very man who [sic] hands loose the atomic bomb on Hiroshima, we know the chief of staff who planned that attack, we know the chief of responsible state. Is murder on their conscience? We may well doubt it, and not because the event of armed conflict has declared their cause just and their enemies unjust, but because the act is not murder. Show us the charge, produce the proof of the killing contrary to the laws and customs of war, name the man whose hand dealt the blow, produce the responsible superior who planned, ordered, permitted or acquiesced in this act, and you have brought a criminal to the bar of justice.⁷⁰

Suddenly, it became possible—and in some circles even necessary—to minimize the responsibility that Japan bore for any of World War II. Instead, the prevailing discourse emphasized Japan's status as victim of great-power imperialism and the first casualty of the atomic age—the cautionary case that put the chill in the Cold War. This view of a hapless Japan, minding its own business until two bolts from the blue in August 1945 shattered the country but galvanized the nation, struck a chord with a population now two generations removed from the events at issue and keen to see a higher international profile for Japan.. To be sure, a dogged minority of scholars continued to keep Japan firmly on the hook of historical culpability, but the sentiments, particularly among the wider public, about the war and, thus, the tribunal embraced this revisionist view. In this period, as a consequence, Japan staged more ostentatious commemorations

⁶⁸ This documentary displayed significant discrepancies between the English and Japanese translation of the court records for the tribunal.

⁶⁹ Keiichiro, *The Tokyo Trials: The Unheard Defense*, 11.

⁷⁰ *Ibid.*

of its war dead and resolutely refused to acknowledge any complicity in, for example, the fate of the so-called "comfort women" of Korea, the atrocities visited on Nanjing, or the abuse of other Asian peoples in the name of advancing a ravaging "co-prosperity sphere." That this unapologetic turn coincided with the apogee of the Japanese economy did nothing to assuage Japan's neighbors, who remembered the war very clearly and very differently.⁷¹

The 1990s drastically increased the criticism of the IMT-FE as a form of victors' justice. The end of the Cold War heralded the de-classification of Soviet documents that demonstrated the contentiousness of procedural and substantive decisions in the tribunal. Within the Soviet's collection of the prosecution documents were a significant number of rejected requests of the defendants that were not included in the historical record of the trials. In 1995, Japanese Professor Kobori Keiichiro published his dissertation, "The Tokyo Trials: The Unheard Defense," based on these documents.⁷² In this 282-page account, he outlines the defense's evidence that was rejected by the IMT-FE and presents one of the more detailed—and scathing—critiques of the tribunal.

More recently, the sixtieth anniversary of the IMT-FE inspired historians to review and rewrite the historical record of the Tokyo trials. Most notable of these historical accounts are the works of Yuma Totani⁷³ and Madoka Futamura,⁷⁴ who have combined the published historical record of the tribunal with the cultural perspective of the Japanese population. Their research further develops the historical lessons of ill-imposed methods of justice for societal transformation. As noted by Futamura:

The experience of the Tokyo Trial and post-war Japan...demonstrates that the impact and effect of international war crimes tribunals and their principle devices are not necessarily wholly positive, nor are they straightforward. They may not only be complex, subtle, and multifaceted, but also counterproductive and harmful by distorting the perpetrator peoples sense of responsibility, guilt and historical perceptions. Such an impact is not at all welcomed when the strategic purpose of an

⁷¹ Burma, *Wages of Guilt*, 219.

⁷² Keiichiro, *The Tokyo Trials: The Unheard Defense*.

⁷³ Totani, *The Tokyo War Crimes Trial*.

⁷⁴ Futamura, *War Crimes Tribunals and Transitional Justice*.

international war crimes tribunal is to promote the healthy social transformation and true reconciliation, which are vital for the achievement of long-lasting peace in a post-conflict society.⁷⁵

Western academics and legal scholars, as well, have viewed the historical context of the IMT-FE as an improper use of democratic principles within a non-western culture. M. Cherif Bassiouni views the Tokyo tribunal as a misapplication of the rule of law that was manipulated by *realpolitik*; claiming the pursuit of, “political settlements as having priority over justice.”⁷⁶ Furthermore, the Tokyo Trials have received scrutiny from legal scholars as an inadequate application of legal precedent for modern forms of military tribunals.

Less is written, even today, about the extent to which Japan successfully transformed its core social institutions in the wake of World War II. In this regard, then, the common discourse has not advanced to anything like the degree to which the Germans continue to discuss their “inherited” burdens from the Third Reich.⁷⁷ As problematic as the Tokyo tribunal was and is, the question for Japan may not ask when the transition will end but rather whether it has fully begun.

D. LEGACY, LEGALITY, AND THE FUTURE

The Tokyo experience provides a sobering counterpoint to the conventional “happy ending” of Nuremberg. As Allison Danner best describes the jurisprudence of the IMT-FE:

The legacy of the Tokyo tribunal demonstrates the risk of legal overreaching in a climate where the law itself plays an important strategic and political role. If Nuremberg represents a qualified triumph of law’s

⁷⁵ Ibid., 151.

⁷⁶ M. Cherif Bassiouni, “The ‘Nuremberg Legacy,’ in *Perspectives on the Nuremberg Trial*, ed. Guenael Mettraux, (New York: Oxford University Press, 2008), 598. Bassiouni has served numerous times as an independent expert of human rights law for the United Nations and was the Chairman of the UN Drafting Committee for the Establishment of an International Criminal Court in 1998. Furthermore, Bassiouni has served as a legal consultant and advisor the U.S. State Department on topics relating to transitional justice in the Middle East.

⁷⁷ Buruma, *Wages of Guilt*. See esp. Chapters: “War Against the West,” “Auschwitz,” and “Romance of the Ruins.”

expressive power and moral force, Tokyo provides a reminder that legal strategies can also fall short of their intended mark.⁷⁸

The model of Nuremberg, as it was applied to the non-western Japanese culture, may need a significant re-evaluation. If methods of procedural justice are to be used for strategic means of post-conflict resolution of grievances to promote stability, security, and societal transformation, then the standards and practices of judicial prudence must be realistic. Effective transitional justice must take into account the manners in which non-western substantive societies view just resolution. Advocates of international or military tribunals must understand the strategic objectives of post-conflict transformation; they also must pay special consideration to the cultural differences in the perception of justice.

The historical lesson of the post-war Japanese experience demonstrates that social grievances require a more strategic, long-term response. The occupational authority cannot merely separate the responsibility of war crimes, by placing blame upon a few, in an attempt to alleviate the future obligation to retribution and reconciliation. The legacy of the Far East proves that true transitional justice requires a long-term perspective of institutional and judicial reform; the necessity to clearly document and articulate the depth and breadth of injustices; a means of reconciliation for the victims of criminal activity or misuse of force; awareness and education of the public for the purpose of social acceptance of a true and accurate historical record; and most importantly, transition requires a significant passage of time for cultural and individual healing.

If leaders of the United States would have analyzed and criticized the historical lessons of Nuremberg legacy, and its later application of transitional justice in the Far East, the strategic approach to the post-Saddam occupation of Iraq might have been drastically different.

⁷⁸ Danner, "Beyond the Geneva Conventions," 87.

IV. IRAQ: AN EXAMINATION OF THE AL-DUJAIL TRIAL

The United States and Britain, doing business in Iraq as the Coalition Provisional Authority, stage-managed the trial of Saddam Hussein and other leading figures of Saddam's regime with visions of Nuremberg—a founding act of justice on which to base the democratic transformation of the emerging Iraqi state—firmly in mind. On the ground, especially outside of Baghdad's Green Zone, it was beginning to look a lot like Tokyo, instead.

To be sure, Saddam and his co-defendants were charged with crimes against Iraqi citizens throughout Saddam's reign; the Al-Dujail incident itself dates to 1982 and retaliation following a failed assassination attempt. The occupiers did not intrude into the trial with their own list of grievances, avoiding the Pearl Harbor fixation of the IMT-FE. Still, the Iraqi proceedings acquired more than a whiff of a “kangaroo court” under the watchful gaze of the CPA. For one thing, Saddam argued in his defense that the violent response to the Al-Dujail incident was a necessary measure for the security of the nation that served the best interest of Iraqi society. Both Radhabinod Pal and Georg Schwarzenberger had passed on long before 2006, but one of their chief contentions with the Tokyo tribunal—the necessity of national security—was alive and well in Baghdad this day.

The cultural lens also obscured the meaning and the aim of the trial. Before the U.S. intervention, many actors of the international community were aware of the regime's crimes, “because Hussein and those in his regime who ordered and executed these crimes prided themselves in making them publicly known. The publicizing of these atrocities terrorized Iraqi society, thus making it easier for the ruling regime to impose its will without opposition.”⁷⁹ The liberation of Iraq was still fresh in 2006—so fresh that these habits of interpretation surely persisted. As such, the publicity surrounding Saddam's trial must of seemed like a similar exercise in propaganda. Certainly Saddam

⁷⁹ M. Cherif Bassiouni, “Lessons From the Saddam Trial: Ceding the High Ground: The Iraqi High Criminal Court Statute and the Trial of Saddam Hussein” *Case Western Reserve Journal of International Law*, vol. 39, 89.

dismissed the proceedings as “theater.”⁸⁰ Amid the growing insurgency, the show-trial angle resonated with the Iraqi population, especially the Sunnis, who proclaimed that court served only to humiliate the Sunni minority, of which Saddam had been the star player.⁸¹ Furthering the Sunni claim of sectarian vengeance was the conduct and timing of Saddam’s execution:

The hasty and chaotic execution of Hussein on the first day of ‘Eid al-Adha for Sunnis cemented the sectarian perceptions of the IHCC. While opinions as to the legality of the timing of the execution have varied, on a political level, the decision must be seen as a serious mistake and reflects the politicized nature of the IHCC.⁸²

A. GENEVA, THE HAGUE, AND BAGHDAD

On May 1, 2003, President George W. Bush declared the end of major combat operations in Iraq. Following this declaration, the United States and the United Kingdom petitioned the U.N. Security Council for the legal authority to establish their presence as an occupation force. In response to this request, the Security Council formally acknowledged the Coalition Provisional Authority by passing Resolution 1483, which explicitly grants occupation authority for “the reconstruction of Iraq, and the restoration and establishment of national and local institutions for representative governance.”⁸³

Resolution 1483 required the CPA to provide temporary governance of Iraq within the strictures of the UN Charter and international law. In particular, the resolution required compliance with the Hague Regulations of 1907 and the Geneva Convention. (The Hague Regulation of 1907 establishes the obligations and responsibilities of an occupation force. In accordance with this customary law, an occupying force is required to “take all the measures in his power to restore, and ensure, as far as possible, public

⁸⁰ Michael A. Newton, “A Near Term Retrospect on the Al-Dujail Trial & the Death of Saddam Hussein,” *Transnational Law & Contemporary Problems*, vol. 17, 39-43.

⁸¹ Bassiouni, “Lessons From the Saddam Trial,” 96.

⁸² *Ibid.*

⁸³ United Nations Security Council (UNSC) Resolution 1483, 22 May 22, 2003.

order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”)⁸⁴

Protocol I, Article 4 of the Geneva Convention refines the limitations on an occupation force established by the Hague Regulations. Under Protocol I, the occupying force cannot: 1) change the functioning of the governmental administration of the territory; 2) change the existing legal system; 3) issue penal provisions; 4) change the tribunal process; or 5) prosecute citizens for criminal activity committed prior to the occupation.⁸⁵ The United States has not ratified Protocol I, claiming that the document “accords far too much protection and legitimacy to non-state groups, including terrorist organizations.”⁸⁶ Nonetheless, the United States is legally bound to uphold the laws of occupation by Resolution 1483. Therefore, the United States must adhere to applicable law that limits an occupier’s authority. In the case of Saddam Hussein, the UN Security Council resolution restricted U.S. enforcement of criminal prosecution for war crimes committed against Iraqi civilians.

The CPA was further restricted from prosecuting Saddam due to U.S. domestic law. The Genocide Convention Implementation Act of 1987 precludes the United States from prosecuting individuals for war crimes, conceding the judicial proceedings to either the international community or the nation in which the crimes were committed. The law states: “Persons charged with genocidal offenses should be tried by a competent tribunal of the state in which the crime was committed.”⁸⁷ As such, the trial of Saddam Hussein and other leading lights in the “old” Iraq fell officially to the first provisional government of Iraq. Nonetheless, the CPA maintained significant influence over the Iraqi judicial system, the tribunal process for the Al-Dujail trial, and the penal provisions of the IHCC.

The customary interpretation of the Fourth Geneva Convention allows an occupying force to modify domestic law when the existing government of the territory

⁸⁴ Sean D. Murphy, *Principles of International Law* (Concise Hornbooks: Thompson/West, 2006), 457.

⁸⁵ Bassiouni, “Lessons From the Saddam Trial,” 44-48.

⁸⁶ Murphy, *Principles of International Law*, 463.

⁸⁷ Christopher C. Joyner, “United States: Genocide Convention Implementation Act of 1987, Introductory Note” *International Legal Materials*, Vol. 28, No. 3, 775.

deprives civilians the rights and safeguards provided by the convention. On the basis of this customary law, the CPA was obliged to defend their involvement in the administrative and judicial matters of Iraq. Under Article 64 Geneva Convention, the CPA was obligated to protect civilians, maintain an orderly government, and defend the security of the occupying power.⁸⁸ Immediately, the U.S. occupation force published CPA Order Number 1, *The De-Ba'athification of Iraqi Society*. Similar to the “de-nazification” of Germany following World War II, the CPA provision removed the top three layers of the Iraqi government and excluded for life all members of the Ba’ath Party (Saddam’s regime) from public office.⁸⁹

The unintended effect of this order was to redefine the scope and obligations of the CPA. By administratively removing the highest civil servants within the government, the CPA crippled the regime’s ability to govern itself. Thus, the CPA was forced to assume a role as a governing body, as well as, an occupation force. Therefore, under the authority of the UN Security Resolution 1483, the CPA appointed itself, “with all executive, legislative, and judicial authority necessary to achieve its objectives.”⁹⁰ Essentially, the CPA, under control of the U.S. military command, was simultaneously conducting counterinsurgency, nation-building, and establishing administrative governmental operations for the entire country of Iraq.

This expansive mandate forced the CPA to establish rapidly a functioning interim regime with minimal capability of governance and no capability of security. Within two months, the CPA issued Order Number 6, formally recognizing the Iraqi Governing Council as the interim government. The UN Security Council acknowledged the interim government by passing Resolution 1500 in July 2003.

The Security Council, however, quickly undermined the Governing Council in October 2003. In response to the increase in violence and the success of insurgent operations, the UN passed Resolution 1511. The provisions of Resolution 1511 limited

⁸⁸ Fourth Geneva Convention, *Article 64*, 12 August 12, 1949.

⁸⁹ Coalition Provisional Authority (CPA) Order Number 1, *Deba'athification of Iraqi Society*, May 16, 2003.

⁹⁰ Bassiouni, “Lessons From the Saddam Trial,” 29.

the powers of the Iraqi Governing Council and re-affirmed the United States as the occupying authority. Resolution 1511 was diplomatically motivated in order to accelerate peace within Iraq by rapidly transferring governing authority to Iraqi officials. Resolution 1511 states: “The sovereignty of Iraq resides in the State of Iraq, reaffirming the right of the Iraqi people freely to determine their own political future and control their own natural resources, reiterating its resolve that the day when Iraqis govern themselves must come quickly... taking forward this process expeditiously.”⁹¹

The unintended consequence of this resolution was diplomatic pressure on U.S. forces to establish all aspects of a democratic regime in Iraq, despite the ability of the Iraqi government to provide security for itself. The pressure placed on the CPA by the UN Security Council encouraged the coalition leadership to hasten nation-building by constructing institutions haphazardly. Therefore, the CPA focused on establishing democratic institutions prior to securing public order, the result was a judicial system that was politically motivated and subject to extensive western influence.

B. ESTABLISHING THE IRAQI JUDICIAL SYSTEM

On December 9, 2003, four days before the capture of Saddam Hussein, Administrator Paul Bremer signed CPA Order Number 48, which outlined the judicial process of the interim Iraqi regime. Deviating from the norms of international customary law and The Hague Regulations of 1907, the United States chose to transfer judicial authority to Iraq. Unlike Nuremberg, where the Allied Control Authority identified the potential for chaos and maintained a military government and tribunal process run by the Allied powers, the CPA pushed the onus of the rapid transition of justice to the newly established Iraqi regime.

The foundation of the Iraqi Special Tribunal was modeled after judicial systems of a democratic nation, in particular, the U.S. legal system. This drastic shift of bureaucratic structure directly challenged the laws governing an occupation authority and the normative procedures for post-conflict justice. Furthermore, the CPA’s delegation of authority to the Iraqi Special Tribunal claimed to promote, “the rule of law in accordance

⁹¹ UNSC Resolution 1511, October 15, 2003.

with applicable international law.”⁹² This claim, however, was shadowed with political influence and filled with controversy from within Iraq and the international community.⁹³ For example, the foundational elements of the tribunal process were modeled after the Rome Statute of the International Criminal Court; however, its procedures expanded the judicial authority of the new Iraqi government’s use of domestic procedural law in two ways.

First, the Iraqi judicial system expanded the crimes punishable within domestic courts. In particular, the Iraqi judicial model enabled judges to interpret international procedural law when evaluating crimes of genocide, war crimes, crimes against humanity, or violations of applicable Iraqi laws. The jurisdiction of the tribunal courts to try such cases was limited to crimes committed between July 17, 1968, and the UN recognition of the CPA.⁹⁴ Essentially, the special tribunal was given the authority equivalent to the International Criminal Court (ICC) for the purpose of conviction and punishment of the Ba’ath regime. The second order effects of this jurisdiction enabled the Iraqi Special Tribunal to serve as an official court for domestic grievance and vengeance against the Ba’ath regime, as demonstrated in the Al-Dujail trial against Hussein.

Second, the provision and jurisdiction of the Iraqi tribunal modified the foundation of the ICC and the United Nations opposition to the death penalty. In accordance with CPA Order 48, the established judicial system recognized “the general concerns of the Iraqi people,” and the “desire... to try members of the Ba’athist regime accused of atrocities and war crimes.”⁹⁵ While the order claims “to prevent any threat to public order by revenge actions and vigilantism,”⁹⁶ the political nature of the tribunal process, coupled with the expansion of jurisdiction despite the normative procedures established by the ICC, demonstrates the contrary.

⁹² CPA Order Number 48, *Delegation of Authority Regarding an Iraqi Special Tribunal*, December 9, 2003.

⁹³ Newton, “A Near Term Retrospective on the Al-Dujail Trial,” 35.

⁹⁴ CPA Order Number 48. See esp. section III: “Jurisdiction and Crimes.”

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

For example, the decision to accept the capital punishment for the genocidal crimes of the Ba'ath Regime violated the international legal norm of the *Lex Mitior Principle*, which grants a defendant convicted of a crime the benefit of a lighter punishment when there has been a change in the law.⁹⁷ While the Ba'ath Regime adopted the death penalty as the maximum form of criminal punishment in the Iraqi Penal Code of 1969,⁹⁸ the CPA formally suspended its use in June 2003—six months before Hussein's capture. Under the authority of the administrator of the occupation government, L. Paul Bremmer, CPA Order 7, Section 3 acknowledged the Iraqi Penal Code—with some notable exceptions. In regard to the use of the death penalty, the order states: “Capital punishment is suspended. In each case where the death penalty is the only available penalty prescribed for an offense, the court may substitute the lesser penalty of life imprisonment, or such other lesser penalty as provided for in the Penal Code.”⁹⁹ The law of the IHCC adopted the Iraqi Penal Code of 1969, however, failed to acknowledge the CPAs suspension of capital punishment. While Saddam's defense did not challenge the use of the death penalty, this selective use of judicial powers further degrades the legitimacy of the tribunal and creditability of the IHCC.

C. THE AL-DUJAIL TRIAL: SADDAM'S DEFENSE

Ultimately, the decision to have a domestic court adjudicate criminal activity of an international level has been criticized and viewed as a political means to seek vengeance against the former dictator. Furthermore, the manners and decisions of the trial proceedings, to say nothing of Saddam's execution, increased sectarian separation in the Iraqi post-conflict environment, most likely fanned the flames of the insurgency, and diminished the perceived creditability, legality, and fairness of the IHCC. The capture of

⁹⁷ The *Lex Mitior Principle* supports the notion that a person will benefit from a lighter punishment when there has been a change in the law. In regards to the *Lex Mitior Principle*, the Iraqi Penal Code that established the death penalty would have been disregarded by the occupational authority under CPA Order Number 7, Section 3 which suspended the all forms of capital punishment offering judicial authority the less sentence of life imprisonment.

⁹⁸ *Iraqi Penal Code*, Iraq Ministry of Justice Penal Law No. 111, December 15, 1969. <http://www.loc.gov/law/help/hussein/docs/IraqiPenalCodeof1969.pdf>. See esp. Chap. 3, “Criminal Offenses.”

⁹⁹ CPA Order Number 7, *Penal Code*, June 10, 2003.

Saddam Hussein on December 13, 2003, was a historical event and necessary victory for Iraqi society. The subsequent trial of Saddam and other senior Ba'ath leaders was a symbolic event that cannot be underestimated. The establishment of the Iraqi Special Tribunal and its process developed for its first trial was a significant achievement. However, the hasty push to establish legitimacy coupled with the deviations of international norms will forever burden the legacy of the Al-Dujail trial, a legacy that has been criticized as victors' justice.

Before the official arraignment of Saddam, the Iraqi Special Tribunal was plagued by the "popular misconception that the trial was a form of American power."¹⁰⁰ This perception began in January 2004, when CPA Administrator Bremer pledged \$75 million to establish the necessary institutions for the tribunal process. Furthermore, during the spring of 2004, the U.S. Department of Justice sent prosecutors, lawyers, and investigators to Baghdad to aid the investigative process. Judges were also provided training, by advisors of the CPA under a special task force designed to prepare the Iraqi judicial structure for trial No. 2, Al-Dujail.¹⁰¹

Western influence extended beyond training the prosecutors and judges of the trial. The CPA created the Regime Crimes Liaison Office (RCLO) in May 2004. The purpose of the RCLO was to select and vet judges and prosecutors. The legitimacy of the process was intensely scrutinized for selecting neo-conservatives that aligned with the political opinion of the Bush administration. Even before the arraignment of Saddam, the trial was perceived as a form of victors' justice and an, "illegitimate process tailored by the Americans to seek revenge upon Ba'athist and bolster support for the war effort following the unsuccessful search for weapons of mass destruction."¹⁰²

In July 2004, the Iraqi Special Tribunal arraigned Saddam and seven members of the Ba'ath party. In the U.S. judicial system, the purpose of an arraignment hearing is for the court to establish the charges against the accused and to accept the defense's plea.

¹⁰⁰ Newton, "A Near Term Retrospective on the Al-Dujail Trial," 41.

¹⁰¹ The eight defendants were charged with crimes against humanity for the massacre of 142 Shiites in 1982. The massacre was in retaliation for an attempted assassination of Saddam during his visit to Dujail on July 8, 1982.

¹⁰² Bassiouni, "Lessons From the Saddam Trial," 40.

This arraignment demonstrated the western influence within the trial process in two ways. First, the procedures adopted by the IHCC did not require an arraignment process. This fact created the perception that the arraignment was convened based on American political influence. Second, during the arraignment the sitting judge failed to announce the charges against Saddam and also failed to receive his plea, further demonstrating that the process was merely a show trial, and Saddam presumed guilty.

During the trial, Hussein directly challenged the legitimacy of the tribunal, posing the question: “How can you charge me with anything without protecting my rights under the constitution?”¹⁰³ The defense’s case was centered on the illegitimacy of any judgment against Saddam in light of his position as an elected official, and head of the state. While “there is some dictum in U.S. courts in support of the proposition that head-of-state immunity for acts committed during a leader’s tenure disappears when he or she steps down,”¹⁰⁴ historically the courts have left such decisions to the digression of the executive branch. Furthermore, the defense lawyers continuously challenged the order of the court, claiming that, “the tribunal could not lawfully impose any punishment because it lacked legitimacy or lawful creation.”¹⁰⁵ This claim directly challenged the role of the United States as an occupation force and its significant involvement with the trial process.

To Western legal observers, the diversity of verdicts and sentences demonstrates the happy prevalence of due process and, hence, justice. To Iraqis, particularly those who felt disadvantaged or even persecuted by the new regime, the Al-Dujail trial was more cause for bad feelings—and malevolent acts. During the trial, insurgent operations and terrorist activity greatly increased. Eight individuals associated with the trial of Saddam were murdered, and the original Presiding Judge, Rizgar Amin, resigned his position amid political and media pressure. Notwithstanding Saddam’s guilt, the influence of the insurgency and inadequacy of the trial process instilled doubt about the impartiality and

¹⁰³ Newton, “A Near Term Retrospective on the Al-Dujail Trial,” 38.

¹⁰⁴ Murphy, *Principles of International Law*, 265.

¹⁰⁵ Newton, “A Near Term Retrospective on the Al-Dujail Trial,” 40.

fairness of the proceedings. In the end, Saddam was duly executed, but little catharsis—or transition—followed.

Name	Charge	Sentence	Notes
<u>Abdullah Kadhem Roweed Al-Musheikhi</u>	G	15 years	Ba'ath Party Official, Al-Dujail
<u>Ali Daeem Ali</u>	G	15 years	Ba'ath Party Official, Al-Dujail
<u>Awad Hamed al-Bandar</u>	G	Death	Chief Judge, Al-Sa'dun
<u>Barzan Ibrahim al-Tikriti</u>	G	Death	Chief of Intelligence, Saddam's half brother
<u>Mizher Abdullah Roweed Al-Musheikhi</u>	G	15 years	Ba'ath Party Official, Al-Dujail
<u>Mohammed Azawi Ali</u>	I	Acquitted	Ba'ath Party Official, Al-Dujail
<u>Saddam Hussein</u>	G	Death	President of Iraq
<u>Taha Yassin Ramadan</u>	G	Life in Prison	Vice President of Iraq. Sentence was later changed to Death in 2007.

Table 3. Al-Dujail Defendants

LEGEND: Charge: All defendants were charged with the murder of 148 Shiites from Dujail, in retaliation for a failed assassination attempt of Saddam Hussein on 8 July 1982. With respect to their charge, defendants were either: indicted but acquitted (I), or indicted and found Guilty (G).

D. THE LEGACY OF AL-DUJAIL?

The Al-Dujail trial will continue to mark a black eye for methods of post-conflict justice in the modern operational environment. The methods of transitional justice imposed by the CPA were carefully orchestrated within the context of the law, however, right or wrong, they have forever changed customary norms of international law established at Nuremberg.

As one scholar has noted: “Within the highly politicized context of Iraq, those U.S. and Iraqi officials who participated in the establishment of the IHCC lost sight of the deeper and far-reaching significance and implications of these proceedings for the future of the rule of law in Iraq and in the Arab world.”¹⁰⁶ While the decisions and actions of these individuals were in good faith, their actions leave question within the historical

¹⁰⁶ Bassiouni, “Lessons From the Saddam Trial,” 95.

record as to whether they were subject to external political factors seeking victors' justice against the former Iraqi dictator.

Using a judicial process against Saddam was seen by external political leaders as a broad method to achieve post-conflict justice in Iraq. In the event, however, the lack of legal clarity, the visible role of western influence, and the lack of commitment to the achievement of meaningful justice have created perceptions that "the IHCC is a political body that is bent on exercising victors' justice."¹⁰⁷ In retrospect, the Al-Dujail trial merely demonstrated that the judicial process could prove the well-known guilt of a tyrannical regime and punish that regime for its crimes.

¹⁰⁷ Bassiouni, "Lessons From the Saddam Trial," 96.

THIS PAGE LEFT INTENTIONALLY BLANK

V. RECOMMENDATIONS FOR FUTURE TRANSITIONS

Following the U.S. invasion and overthrow of the Ba'ath Regime, the CPA instituted policies that failed to promote an effective form of transitional justice. As Fukuyama noted: “There was a tendency among promoters of the [2003–2011 Iraq] war to believe that democracy was a default condition to which societies would revert once liberated from dictators.”¹⁰⁸ Iraq’s transition has proved rather more complicated, however.

The demise of Saddam’s regime and beginning of the U.S. occupation was cluttered with disorder, looting, and a general lack of public security. The deficiencies in U.S. post-war planning and inability of the CPA to restore a peaceful routine to daily life resonated doubts of the U.S. just war cause, and the Iraqi populace developed a, “mistrust of a U.S.-dominated trial process for the former regime figures.”¹⁰⁹ Perhaps the establishment of the IST was supposed to kick-start the democratization process, but instead, more than a half-century of assumptions toppled over into a mess of clashing realities on the ground in Baghdad.

The first question is why the trial of Saddam failed to pay the full Nuremberg dividend of due process and democracy ever after. The more basic and urgent question, though, is whether it ever could have lived up to the expectations attached to the Nuremberg legacy. It is unfortunate, that despite the fairness of the trial or the

¹⁰⁸ Francis Fukuyama quoted in W. Andrew Terrill, *Lessons of the Iraqi De-Ba'athification Program for Iraq's Future and the Arab Revolutions* (Carlisle Barracks, PA: U.S. Army War College Strategic Studies Institute, 2012), 1.

¹⁰⁹ International Center for Transitional Justice Human Rights Center. (ICTJ-HRC) *Iraqi Voices: Attitudes Toward Transitional Justice and Social Reconstruction*. Berkley: Occasional Paper Series, May 2004. The ICTJ purpose is to, “assist countries pursuing accountability for mass atrocity or human rights abuses,” and, “the development of strategies for transitional justice comprising five key elements: prosecuting perpetrators, documenting violations through non-judicial means such as truth commissions, reforming abusive institutions, providing reparations to victims, and advancing reconciliation.” In the summer of 2003—prior to the capture of Saddam and establishment of the IST—the Human Rights Center of the ICTJ conducted extensive interviews and focus groups with a diverse cross-section of the Iraqi population. In May 2004, the center released their recommendations for transitional justice in Iraq based upon their analysis of the Iraqi’s perspectives.

establishment of an independent judiciary, “the image of Saddam Hussein being taunted at his final moments is likely to stay in people’s minds as the legacy of the tribunal.”¹¹⁰

A. THE LEGACY OF A LEGACY—AND ITS HISTORY

Nuremberg was not without its detractors at the time or since, though the consensus that it did, in fact, represent a genuine moment of transitional justice is borne out by Germany’s continued acceptance of due process, human rights, civil liberties, and democracy. In this regard, the IMT does prove the model for methods of transitional justice that began following World War II, at least in the European theater. In its broad strokes, then, the architects of the Global War on Terror had every reason to prefer the Nuremberg model because they very much wanted the Nuremberg outcome.

Two complicating factors make this goal much harder to realize after 1946 Germany, however. First, even after more than a decade of state-sponsored lawlessness under the Nazis, Germans had plenty of experience with a legal system, and a view of the role of law and legality in society that had its key elements in common with the process and precepts that the IMT brought to Nuremberg. In a way, the Nuremberg trials restored justice to Germany, rather than introducing a fundamentally alien system in the name of transforming the state. The IMT’s rules made sense, so the IMT’s outcome made sense—intellectually and culturally. It was a relatively easy matter after that to build on this basis of western justice.

The second flaw in the Nuremberg model comes with the nature of “transition.” At what point can we say that the German transition is complete? Within the same week of January, several German cities marked Holocaust Remembrance Day (January 27, the day on which Auschwitz was liberated) only to witness Neo-Nazi demonstrations during the yearly ritual. According to news reports: “Marking the 27th of January as a day of remembrance has turned it into a national event where everyone can express his opinion, however miserable.”¹¹¹ Despite the emotional disagreements, a robust and fair justice

¹¹⁰ Zakia Afrin, “Post-Conflict Justice in Iraq,” *Annual Survey of International & Comparative Law*, vol. 14, no. 1, article 3, 23-37.

¹¹¹ Manfred Gerstenfeld, “The Abuse of Holocaust Memory in 2011–2012,” *Jerusalem Center for Public Affairs*, January 27, 2013.

system exists to deal with any transgressions against German law, so in this connection, Germany's transition seems quite thorough, but there remains a qualitative difference in effect and implication when the Germans talk about Nazism. The Germans and their allies still feel this difference, suggesting that, even with four decades of exertions by the '68er generation and its children, some transitional business remains unfinished in Germany today.

The societal transition in Japan has been even less forthcoming. In contrast to Germany's acceptance of the past autocracies, the Japanese culture has maintained a form of historical amnesia toward its past aggressions. As Ian Buruma notes, Japanese cultural acceptance of the past shifts drastically from their perception of the atomic bomb at Hiroshima, in comparison to their view of the brutality of Nanking, and the war crimes perpetrated by the Imperial Army.¹¹² In this respect, the Tokyo trials may well mark the starting point for the Japanese myopic view of their own history, and suggest that their perception of their history has been eroded by politics of post-conflict restoration, rather than a result of cultural differences.

B. TRUTH AND RECONCILIATION

The trials at Nuremberg were an international effort to achieve justice for injustices of the Nazi regime; the transition of judicial institutions, however, were created and established by Germans. Societal reconciliation and unity in postwar Germany was fueled by the Federal German national identity, rooted in resistance, broadly define, to the Nazi regime. The Japanese model for reconciliation was much different; it was controlled and censored by the policy objectives of the American occupation. The lesson here is that the application of transitional justice is "affected by cultural and historical circumstances, but they are never determined by them. If one injects politics into the enchanted Disney world of post-war Japan, things come into sharper focus."¹¹³ The political decision of the American reconstruction, to alleviate societal responsibility for

¹¹² Ian Buruma, *Wages of Guilt*. New York: Penguin Books Ltd, 1995. See esp. Chapters "Hiroshima" and "Nanking."

¹¹³ *Ibid.*, 295.

Japanese imperialism from the citizenry, encouraged a view of victimization for the populace.

Following conflict, the transformation of justice is predicated on the need for an accurate and truthfully documentation of the historical record. A misuse of the tribunal process, based on the occupational decision to limit the Japanese guilt of war to the imperial aspirations of a few—with exception to the emperor, of course—has clouded the memories of the past and challenged the legitimacy of the tribunal.

In comparison to the success of transitional justice in Germany, the Tokyo model might suggest that the cultural misunderstandings and differences undermine the use of judicial proceedings as a means to effectively transform to a non-western society to democracy. However, in retrospect, the lessons of Nuremberg come clearer in comparison to their application in the Far East. The experience of the Tokyo trials clearly shows that transitional justice requires more than the punishment of the guilty, or those perceived to be guilty for that matter. The tribunal process, while necessary for victim healing and international accountability, is not the completion of the process.

C. SHOW TRIAL VERSUS CRIMINAL COURT

Al-Dujail, and the punishment of Saddam, in this case maintained the same political objective as the Tokyo trials. As in the case of Tokyo, the tribunal was motivated by political reasons other than the transition to a fair and equitable judicial system. Essentially, Al-Dujail and Tokyo marked significant deviations from the Nuremberg legacy, even as they claimed to perfect the model. In the event, they were show trials that attempted at social reconstruction without the formulation of truth or resolution for grievances. For this reason, among others, the United States needs to examine the historical lessons from both Tokyo and Iraq as it formulates new approaches for applying transitional justice within the future national security environment.

The prosecution of Saddam and other perpetrators was necessary and vital for both the procedural and substantive forms of justice. However, the decision to try Saddam within the Iraqi judicial system subjects the process to serious criticisms that detract from its legacy—and effectiveness. If trials within a transforming society fall “on the spectrum with the show trial on one end and the conventional domestic criminal or

civil trial on the other,”¹¹⁴ then Saddam’s tribunal clearly counts as show trial. Because the transgressions of the Ba’ath Regime were well known by Iraqis and the international community, what other purpose would a domestic trial serve? After all, “everyone knows Saddam is guilty, so what is there to prove?”¹¹⁵

A 2004 study released by the International Center for Transitional Justice (ICTJ) clearly articulated that the Iraqi people sought a domestic court for the purpose of seeking revenge and retribution against Saddam. According to the report, the general perception of the population believed that the execution and torture of Saddam was sufficient, and no trial was required. The study also concludes that the Iraqi people wanted the Saddam regime publically punished, “to put them on television to say that they killed, executed, and buried people.”¹¹⁶ Clearly, the victims were more concerned with extracting revenge, rather than the establishment of an enduring system of judicial democracy.

Even more troubling was the report’s findings on the Iraqi population’s distrust for the United States. The ICTJ study revealed significant public resentment of the United States for two reasons. First was the historical support the United States provided to the regime. Second, there was a growing concern for the lack of security and public insurrection under the CPA. Furthermore, participants of the study were disappointed with the UN for its lackluster rebukes of the tyrant as well as the disastrous economic effects of UN-imposed sanctions before the occupation.¹¹⁷ Essentially, the public clamor for a domestic criminal tribunal had little to do with a desire for justice or transformation of the process; rather, it was a lack of confidence in the international community coupled with a deep desire for revenge.

D. WHITHER TRANSITIONAL JUSTICE?

Judicial transformation is a necessary requirement for nation-building, however “implementing piecemeal processes in transitional societies runs the enormous risk of failing to adequately address the past, arrive at the truth, achieve justice, and rebuild

¹¹⁴ Posner, “Transitional Justice as Ordinary Justice,” 766.

¹¹⁵ ICTJ, “Iraqi Voices: Attitudes Towards Transitional Justice,” 26.

¹¹⁶ Ibid.

¹¹⁷ Ibid., 48–50.

trust.”¹¹⁸ All transitions are inherently different, so the process must account for the peculiarities of history, society, culture, time, and place. The one-size fits all application of universal justice—as it applied by MacArthur in the Far East, for example—disregards the political, social, and cultural needs of the victims. This same flaw characterized the trial of Saddam Hussein in Iraq.

In the case of Al-Dujail, the desire for retribution and punishment—by both the U.S. government and Iraqi people—was detrimental to the legacy of the IHCC as an effective means of transitional justice. The decision to conduct a domestic tribunal with the purpose of trying a brutish former dictator was unprecedented within the norms of international law. The political motivations of the CPA and its extensive control of the tribunal process tainted the legacy Al-Dujail and undermined the perception of legitimacy for the Iraqi judicial system. The politicization of the trial by the occupation force, created a hybrid form of judicial-proceedings that attempted to fuse the “adversary-accusatorial [procedural] American system with the Iraqi inquisitorial [substantive] one.”¹¹⁹

The true purpose of post-conflict justice goes beyond the courtroom application of revenge or the punishment of the guilty. Ultimately, the goal of the occupation force should be the transition of a war-torn society to accept and apply the rule of law. First and foremost, transformation is predicated on an independent judiciary that has established both international and national creditability. This is not to say that the judiciary is ready to accept the responsibility for the trial of domestic war criminals or gross violators of human rights. Rather, the initial purpose of the judicial system should be to create mechanisms and processes for addressing grievances, both past and present. Creating a creditable means to address grievances will aid post-conflict security measures, maintain order by providing retribution, and reduce acts of retaliation and revenge.¹²⁰

¹¹⁸ ICTJ, “Iraqi Voices: Attitudes Toward Transitional Justice,” i.

¹¹⁹ Bassiouni, “Post-Conflict Justice in Iraq,” 84-85.

¹²⁰ Thomas Szayna, Derek Eaton, and Amy Richardson, *Preparing the Army for Stability Operations*, (Santa Monica, CA: RAND, 2007). See esp., Chapter 2: “Building Interagency Collaborative Capacity for SSTR Operations.”

The use of tribunals to document Saddam’s gross violation of the rights of his people as citizens and human beings can only re-establish a small portion of the historical record. Therefore, the transforming government must establish a mechanism of truth seeking, in order to properly document and preserve the historical memory. A timely investigation of grievances would aid in establishing a larger national narrative, which would promote the trust, understanding, and hopefully, cultural unity. The ICTJ recommends the use of truth commissions, which would, “provide a comprehensive account of past human rights abuses; provide victims with a forum that acknowledges their suffering; make recommendations about preventive measures; explore the possibility of providing reparations; and promote the rebuilding of trust and understanding without sacrificing accountability.”¹²¹

As the historical record is created, the transitional nation must address the needs of those who suffered under the previous regime. While compensation does not necessarily mend the wounds of the past, reparations can rebuild livelihoods, restore dignity and allow those who suffered most to join the new society on a somewhat steadier footing. A mechanism to compensate victims by the new government would serve as both a material and symbolic recognition of past injustices and promote both national and international awareness. In the case of Iraq, proper use of reparations could unify the Iraqi society, “on the basis of a shared legacy of persecution and repression.”¹²²

Ultimately, it may be that military tribunals can begin the process by which a post-conflict state can transition to the rule of law, the observation of human rights, democracy, and prosperity amid truth and reconciliation and “ownership” of the past. To succeed in any sense, however, this transformation requires real support and will from within the transforming polity over the long term. In other words, tribunals may initiate a transformation, but there is more to the project than convening a court session.

¹²¹ ICTJ, “Iraqi Voices: Attitudes Toward Transitional Justice,” ii.

¹²² Bassiouni, “Lessons from the Saddam Trial,” 89.

THIS PAGE LEFT INTENTIONALLY BLANK

LIST OF REFERENCES

- Afrin, Zakia. "Post-Conflict Justice in Iraq." *Annual Survey of International & Comparative Law*, vol. 14, no. 1 (August 30, 2010): 23–37.
- Baker, James, E. *In the Common Defense: National Security Law for Perilous Times*. New York: Cambridge University Press, 2007.
- Bassiouni, M. Cherif. "Lessons from the Saddam Trial: Ceding the High Ground: The Iraqi High Criminal Court Statute and the Trial of Saddam Hussein." *Case Western Reserve Journal of International Law*, vol. 39 (2006-2007): 21–97.
- . "The 'Nuremberg Legacy.'" In *Perspectives on the Nuremberg Trial*, edited by Guenael Mettraux. New York: Oxford University Press, 2008. pp. 577-598.
- . "Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal." *Cornell International Law Journal*, vol. NN (September 23, 2005): 101–166.
- Buruma, Ian. *Wages of Guilt*. New York: Penguin Books Ltd, 1995.
- Danner, Allison M. "Beyond the Geneva Conventions: Lessons From the Tokyo Tribunal in Prosecuting War and Terrorism." *Virginia Journal of International Law*, vol. 46 (Fall, 2005): 83-130.
- Futamura, Madoka. *War Crimes Tribunals and Transitional Justice: The Tokyo Trial and the Nuremberg Legacy*. New York: Routledge, 2008.
- Gerstenfeld, Manfred. "The Abuse of Holocaust Memory in 2011-2012." *Jerusalem Center for Public Affairs*, January 27, 2013. <http://jcpa.org/article/the-abuse-of-holocaust-memory-in-2011-2012/>.
- Goodhart, Arthur L. "The Legality of the Nuremberg Trials." In *Perspectives on the Nuremberg Trial*, edited by Guenael Mettraux. New York: Oxford University Press, 2008. pp. 626-637.
- International Center for Transitional Justice Human Rights Center. (ICTJ-HRC) *Iraqi Voices: Attitudes Toward Transitional Justice and Social Reconstruction*. Berkley: Occasional Paper Series, May 2004. <http://ictj.org/publication/iraqi-voices-attitudes-toward-transitional-justice-and-social-reconstruction>
- Jackson, Robert H. "The Challenges of International Lawless." in *Perspectives on the Nuremberg Trial*, edited by Guenael Mettraux. New York: Oxford University Press, 2008. pp. 5-12.
- . *The Nurnberg Case: Together With Other Documents*. New York: Alfred A. Knopf, 1947.

- . *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials*. Washington, D.C.: US GPO, 1949.
- . “Report of Robert H. Jackson to the International Conference on Military Tribunals.” in *Perspectives on the Nuremberg Trial*, edited by Guenael Mettraux. New York: Oxford University Press, 2008. pp. 697-703.
- Jarausch, Konrad H. *After Hitler: Recivilizing Germans, 1945–1995*. Oxford: Oxford University Press, 2006.
- Jescheck, Hans-Heinrich. “The Development of International Criminal Law After Nuremberg.” In *Perspectives on the Nuremberg Trial*, edited by Guenael Mettraux. New York: Oxford University Press, 2008. pp. 408-432.
- Joyner, Christopher C. “United States: Genocide Convention Implementation Act of 1987, Introductory Note.” *International Legal Materials*. vol. 28, no. 3, November 4, 1988. pp. 754-785.
- Keiichiro, Kobori. *The Tokyo Trials: The Unheard Defense*. Tokyo: Kodansha Ltd., 1995.
- Kelsall, Tim. “International Criminal Justice in Non-Western Cultures.” *Oxford Transitional Justice Research Working Paper Series*, April, 12, 2010, http://www.csls.ox.ac.uk/documents/Kelsall_InternationalCriminalJustice_Final.pdf.
- Knoops, Geert-Jan A. “The Transposition of Superior Responsibility onto Guerrilla Warfare Under the Laws of the International Criminal Tribunals,” *International Criminal Law Review*, vol. 7, no. 2 (April 1, 2007): pp. 505-529
- Luban, David. “The Legacies of Nuremberg.” in *Perspectives on the Nuremberg Trial*, edited by Guenael Mettraux. New York: Oxford University Press, 2008. pp. 638-672.
- Maier, Charles S. *The Unmasterable Past: History, Holocaust, and German National Identity*. Cambridge, MA: Harvard University Press, 1988.
- Marrus, Michael R. *The Nuremberg War Crimes Trial 1945-46*. Boston: Belford Books, 1997.
- Merkel, Reinhard. “The Law of the Nuremberg Trial: Valid, Dubious, Outdated.” in *Perspectives on the Nuremberg Trial*, edited by Guenael Mettraux. New York: Oxford University Press, 2008. pp. 555-576.
- Mettraux, Guenael. *Perspectives on the Nuremberg Trial*. New York: Oxford University Press, 2008.

- Murphy, Sean D., *Principles of International Law*. Concise Hornbooks: Thompson/West 2006.
- Newton, Michael A. "A Near Term Retrospect on the Al-Dujail Trial & the Death of Saddam Hussein," *Transnational Law & Contemporary Problems*, vol. 17 (Winter, 2008): 31–71.
- Posner, Eric, and Adrian Vermeule. "Transitional Justice as Ordinary Justice." *Harvard Law Review*, vol. 117, no. 3(January 2004): pp. 761-825.
- Roling, Bet V.A. "The Nuremberg and the Tokyo Trials in Retrospect." In *Perspectives on the Nuremberg Trial*, edited by Guenael Mettraux. New York: Oxford University Press, 2008. pp. 455-472.
- Schwarzenberger, Georg. "The Judgment of Nuremberg." in *Perspectives on the Nuremberg Trial*, edited by Guenael Mettraux. New York: Oxford University Press, 2008. pp. 167-189.
- Shoichi, Watanabe. *The Tokyo Trials and the Truth of "Pal's Judgment."* Tokyo: PHP, 2009.
- Stimson, Henry L., Stettinius Edward R. Jr., and Biddle, Francis. "Memorandum for the President: 22 Jan. 1945." in *The Nuremberg War Crimes Trial 1946-1946: A Documented History*, edited by Michael R. Marrus. Boston and New York: Bedford/St. Martin's, 1997. pp. 30-33.
- . "Memorandum Opposing the Morgenthau Plan: 9 Sept. 1944." in *The Nuremberg War Crimes Trial 1946-1946: A Documented History*, edited by Michael R. Marrus. Boston and New York: Bedford/St. Martin's, 1997. pp. 26-27.
- . "The Nuremberg Trial: Landmark in Law." in *Perspectives on the Nuremberg Trial*, edited by Guenael Mettraux. New York: Oxford University Press, 2008. pp. 617-625.
- Szayna, Thomas, Derek Eaton, and Amy Richardson. *Preparing the Army for Stability Operations*. Santa Monica, CA: RAND, 2007.
- Taylor, Telford. *Nuremberg and Vietnam: An American Tragedy*. New York: New York Times Books, 1970.
- Terrill, Andrew W. *Lessons of the Iraqi De-Ba'athification Program for Iraq's Future and the Arab Revolutions*. Carlisle Barracks, PA: U.S. Army War College Strategic Studies Institute, 2012.
- Totani, Yuma. *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II*. United States: Library of Congress, 2008.

United States Department of State. *Transitional Justice in Post-Saddam Iraq: The Road to Re-establishing Rule of Law and Restoring Civil Society, The Future of Iraq Project, Working Group on Transitional Justice*. March 2003.

United States War Department, *Field Manual 27-10: Rules of Land Warfare*. Washington: USGPO, 1 October 1940.

Wright, Quincy. "The Law of the Nuremberg Trial." in *The American Journal of International Law*, vol. 41, no. 1.

Ziemke, Earl F. "The U.S. Army in the Occupation of Germany, 1944–1949." in *Army Historical Series*, edited by Maurice Matloff. Washington, D.C.: Center for Military History, 1975

INITIAL DISTRIBUTION LIST

1. Defense Technical Information Center
Ft. Belvoir, Virginia
2. Dudley Knox Library
Naval Postgraduate School
Monterey, California
3. Professor Carolyn Halladay
Department of National Security Affairs
Naval Postgraduate School
Monterey, California
4. Professor Erik Dahl
Department of National Security Affairs
Naval Postgraduate School
Monterey, California